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IN THE

Supreme Court of the United States

19 Orig.

STATE OF COLORADO

versus

J. FOSTER SYMES, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS AND EXHIBITS.

THE BRADFORD-ROBINSON PTG. CO., DENVER

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IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF COLORADO FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE J. FOSTER SYMES, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, AND DIRECTED ALSO TO THE SAID UNITED STATES DISTRICT COURT.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

CLARENCE L. IRELAND,
Attorney General of Colorado,

GEORGE A. CROWDER,
Assistant Attorney General of Colorado,
Attorneys for the State of Colorado.

STATE OF COLORADO, vs. J. FOSTER SYMES, Judge of the District Court of the United States for the District of Colorado, and the DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.	IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, the State of Colorado, by William H. Adams, its Governor, and moves this honorable court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing J. Foster Symes, Judge of the District Court of the United States for the District of Colorado, and also directing the said United States District Court to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why your petitioner should not have such relief as may seem just and proper.

CLARENCE L. IRELAND,
Attorney General of Colorado,

GEORGE A. CROWDER,
Assistant Attorney General of Colorado,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF COLORADO FOR A WRIT OF MANDAMUS DIRFCTED TO THE HONORABLE J. FOSTER SYMES, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, AND DIRECTED ALSO TO THE SAID UNITED STATES DISTRICT COURT.

PETITION FOR WRIT OF MANDAMUS.

CLARENCE L. IRELAND,
Attorney General of Colorado,

GEORGE A. CROWDER,
Assistant Attorney General of Colorado,
Attorneys for the State of Colorado.

STATE OF COLORADO,

vs.

J. FOSTER SYMES, Judge of the District Court of the United States for the District of Colorado, and the DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

In the Supreme Court of the United States.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Colorado, by William H. Adams, its Governor, respectfully shows unto this Honorable Court that the jurisdiction of the district court in and for the County of Arapahoe, State of Colorado, a court of record, clothed and invested by the constitution and laws of the State of Colorado with original jurisdiction in criminal proceedings and in the trial of criminal causes has been erroneously wrested from the State of Colorado in the case of People of the State of Colorado vs. Henry Dierks by the act of J. Foster Symes, Judge of the District Court of the United States for the District of Colorado in removing said cause to the United States District Court of Colorado for trial, as will more fully appear, to-wit:

1. On November 9, 1931, an information was filed in the District Court of the First Judicial District of the State of Colorado in and for the County of Arapahoe, charging Henry Dierks, a United States Prohibition Agent, with the murder on November 7, 1931, of one Melford Smith, a resident of Arapahoe County, Colorado.

The defendant Henry Dierks was arrested upon a warrant and capias issued by the District Court of Arapahoe County

and admitted to bail, upon the 10th day of November, 1931, in the sum of $5,000.

Upon November 13, 1931, the defendant Henry Dierks filed a petition in the United States District Court in and for the District of Colorado at Denver, asking, that the cause be removed to the United States District Court for the District of Colorado for trial and that a writ of certiorari and habeas corpus cum causa, issue ordering the removal thereof, and the certification of a transcript of the record and proceedings in said cause.

Upon the same day, to-wit, November 13, 1931, J. Foster Symes, Judge of the United States District Court for the District of Colorado, ordered the removal and issued the writ of certiorari and habeas corpus cum causa, commanding the District Court of the First Judicial District, in and for the County of Arapahoe, to forward a transcript of the record and proceedings in the cause to the United States District Court in and for the District of Colorado. The writ was issued upon the supposed authority of Section 33, Judicial Code, R. S. Sec. 643; Act, March 3, 1875, C. 130, Sec. 8, 18 Stat. 401; Act, February 8, 1894, C. 25, Sec. 1, 28 Stat. 36; Act, March 3, 1911, C. 231, Sec. 33, 36 Stat. 1097; Act, August 23, 1916, C. 399, 39 Stat.

The petition upon which the removal was granted sets forth that upon the day the murder is alleged to have been committed, to-wit, November 7, 1931, the petitioner Henry Dierks was an officer appointed under and acting by authority of the Revenue Laws of the United States, to-wit, a United States Prohibition Agent regularly appointed and commissioned by the Bureau of Prohibition of the United States Department of Justice, and that the act for which he was and is informed against was committed while he was engaged in the discharge of the duties of his office as a United States Prohibition Agent, and while acting by and under the authority of the Internal Revenue Laws of the United States and the

National Prohibition Act and in protecting himself in the discharge of his duties.

2. Upon the 19th day of November, 1931, Joel E. Stone, District Attorney for the First Judicial District of the State of Colorado, filed with the Clerk of the United States District Court for the District of Colorado at Denver, a motion to quash and dismiss the writ and remand the cause to the District Court of Arapahoe County, Colorado. (See Motion to Quash, pages 27-32 of this petition.)

3. Hearing Upon Motion.

The motion to quash and remand was argued before Judge J. Foster Symes, Judge of the United States District Court on the 4th day of December, 1931, and on the 2nd day of January, 1932, Judge J. Foster Symes entered an order overruling the motion to quash and denying the motion to remand the case to the District Court of Arapahoe County, Colorado.

4. Your petitioner includes as a part of its petition the record of Case No. 7000, Petition of Henry Dierks for Writ of Certiorari and Habeas Corpus Cum Causa in the United States District Court for the District of Colorado, marked Exhibit "A," and record of People of the State of Colorado vs. Henry Dierks, in the District Court for the County of Arapahoe, State of Colorado, marked Exhibit "B."

5. Your petitioner avers and alleges that the said Judge J. Foster Symes erroneously interpreted the petition of the defendant Henry Dierks and Section 33 of the Judicial Code, and that his action was and is contrary to and in violation of the laws of the United States, and the rights of the State of Colorado, acting in its sovereign capacity.

6. Because it affirmatively appears from the petition that the allegations therein are insufficient to entitle the petitioner to have said cause removed as ordered in said writ,—

(a) Because it affirmatively appears from the petition

of the said Henry Dierks that the statement made, to-wit, "protecting himself in the discharge of his duties," is a mere recital and conclusion and is not based upon any fact or circumstance set forth in said petition, or showing any necessity for self-defense.

7. Because the said Henry Dierks has failed to allege in said petition, by direct averment or otherwise, that his act excludes the possibility that it was based on acts or conduct of his not justified by his federal duty,—

(a) Because it does not affirmatively appear from the allegations in said petition that at the time of the commission of the alleged crime charged in the information the deceased Melford Smith had any knowledge that the said Henry Dierks was a United States Prohibition Agent; that the petition fails to allege that the said Henry Dierks disclosed his identity to the said Melford Smith prior to the said Henry Dierks striking the said Melford Smith upon the head with petitioner's gun.

(b) The petition of the said Henry Dierks alleges that one Al Green did attempt to assist the said Melford Smith to assault your petitioner and to help the said Melford Smith to escape, which statement is not based upon the averment of any fact, or the alleged commission of an overt act by the said Al Green, or that the said Al Green knew that said Henry Dierks was a Federal Prohibition Agent and the petition further fails to allege or show that the said Henry Dierks disclosed his identity as a Federal Prohibition Agent to the said Al Green.

8. Because it affirmatively appears from the allegations in said petition that the petitioner was not acting within the scope of his authority as a United States Prohibition Agent or that he was justified in the commission of the alleged crime by his duty,—

(a) Because it affirmatively appears from the petition that the allegation, to-wit, the said Melford Smith "did proceed to assault your petitioner" is a mere recital and conclusion of the petitioner and does not disclose any facts or circumstances surrounding the alleged, "did proceed to assault," nor any facts or circumstances showing or tending to show that Melford Smith threatened said Henry Dierks or laid his hands on the said Henry Dierks, or was about to overpower said Henry Dierks, or that said Melford Smith was a boy or a man, or that said Melford Smith was a boy or a man of large stature or powerful physique, and that the said Henry Dierks was incapable of defending himself against said Melford Smith.

(b) It affirmatively appears from the petition that neither the said Al Green nor the said Melford Smith did in any manner threaten to assault or assault the said Henry Dierks.

9. Because it does not affirmatively appear from the petition that what he did was justified by his duty under the federal law, and that the said Henry Dierks did nothing upon which the prosecution could be based,—

(a) That the averments in said petition "that while your petitioner was engaged in the discharge of his official duties as such federal prohibition officer in making and attempting to make said arrest of said Melford Smith and in protecting himself in the discharge of his duties and in attempting to seize said bottle of wine, it became necessary in order to subdue the said Melford Smith for your petitioner to strike and he did strike the said Melford Smith on the head with your petitioner's gun" are mere recitals and conclusions of the petitioner and are not based on any statement of fact or circumstance.

(b) That the petitioner alleges he arrested said Melford Smith and said Al Green and one Leonard Carpenter and conveyed them to the city jail of the City and Coun-

ty of Denver, State of Colorado, pending the filing of charges against them for a violation of the National Prohibition Act and for assaulting an officer of the United States, which allegation fails to disclose what part Leonard Carpenter had in the alleged violation of the National Prohibition Act or why he the said Leonard Carpenter was arrested, nor is there any fact or circumstance set forth in said petition showing or tending to show that Melford Smith, Al Green and one Leonard Carpenter were subject to being charged with assaulting an officer of the United States.

10. That the petition does not fully and fairly set forth facts or circumstances constituting any defense to the crime of murder as charged in the information in violation of the laws of the State of Colorado, or that the petitioner Henry Dierks is immune from punishment by the State of Colorado,—

(a) Because it affirmatively appears from said petition that the facts and circumstances alleged, upon which the said Henry Dierks claims he is entitled to immunity from punishment by the State of Colorado, to-wit, "that Melford Smith did resist arrest; that Melford Smith did attempt to escape; that Melford Smith did attempt to destroy the bottle of wine; that said Melford Smith proceeded to assault petitioner Henry Dierks;" all, if true, constitute under the laws of the United States, and the State of Colorado, misdemeanors, and that the said Henry Dierks was not justified by his federal duty or authorized by law in making the brutal attack upon the said Melford Smith causing his untimely death.

(b) Because it affirmatively appears from the petition of the said Henry Dierks that said Henry Dierks was not assaulted by Melford Smith or that Henry Dierks acted in self-defense.

(c) Because it affirmatively appears from the petition of the said Henry Dierks that it does not disclose whether

or not the alleged act of, "did proceed to assault" made by the said Melford Smith was accompanied with force or was a simple assault and battery, or an assault with a deadly weapon, or any weapon, or by any fact or circumstance that the said Henry Dierks was about to receive at the hands of the said Melford Smith great bodily injury or any facts and circumstances that induced the said Henry Dierks to be in fear or danger of his life, or that he acted in self-defense in committing the act as charged in the information.

(d) That it affirmatively appears from the allegations of the petition that the petitioner Henry Dierks used greater force than was necessary to make the alleged arrest and that use of such violence and greater force was beyond the scope of his authority and not justified by his duty and without any justification whatsoever, and the petition fails to allege by direct averment that his act excludes the possibility that it was based on acts or conduct not justified by his federal duty.

11. That the petition of the said Henry Dierks does not disclose that he made any examination of the wound inflicted upon the said Melford Smith to determine whether or not it was of a serious nature, nor does the petition disclose that the said Henry Dierks at the time of striking said Melford Smith on the head with petitioner's gun or at the time of incarcerating the said Melford Smith in the City Jail of the City and County of Denver requested or sought medical aid for the said Melford Smith.

12. That the petitioner has not been candid, specific and positive in explaining his relations to the transaction nor in showing that his relation to the alleged act was confined to his acts as an officer.

13. That the petition is evasive, contradictory, based upon mere recitals and conclusions and does not specifically set forth facts or circumstances.

14. Your petitioner herein, the State of Colorado, is advised that murder is a common law offense; that the Courts of the United States have no common law jurisdiction in criminal cases; that Section 33 of the Judicial Code does not, ipso facto, grant the right of removal of a cause to the United States District Court of a Federal Prohibition Officer charged with the commission of a crime against the State, either by reason of the duties of the office or under color of office and that the petition of the said Henry Dierks for removal of the cause to the United States District Court is wholly insufficient to warrant the removal of said cause from the District Court of Arapahoe County, Colorado, to the United States District Court for the District of Colorado.

15. Your petitioner is informed and believes and alleges the fact to be that it is the intention of the said Judge J. Foster Symes, as Judge of the United States District Court for the District of Colorado to place the said Henry Dierks, Prohibition Agent, upon trial in the District Court of the United States for the District of Colorado, at the present term of the said United States District Court, now being held in the City of Denver for the offense alleged against the laws of the State of Colorado, and your petitioner is informed and believes and verily avers that it has no other remedy except to petition this Honorable Court for a writ of mandamus to restrain the said United States District Judge J. Foster Symes from proceeding further in said cause.

16. Your petitioner, therefore, humbly prays that a rule may be awarded by this Honorable Court, requiring the said J. Foster Symes, Judge of the United States District Court for the District of Colorado and the said United States District Court to show cause why a writ of mandamus should not be issued, prohibiting and forbidding the said J. Foster Symes from proceeding in the trial of said cause in the said United States District Court and preventing said Court from making any further orders or taking any further action in said cause, and further commanding the United States District Judge J.

Foster Symes and the United States District Court for the District of Colorado to remand said case of the People of the State of Colorado vs. Henry Dierks to the District Court of the First Judicial District in and for the County of Arapahoe, State of Colorado, to be dealt with according to the laws of the State of Colorado.

And as in duty bound, etc.

Respectfully submitted,

WILLIAM H. ADAMS,
Governor of Colorado.

CLARENCE L. IRELAND,
Attorney General of Colorado,

GEORGE A. CROWDER,
Assistant Attorney General of Colorado,
Attorneys for the State of Colorado.

STATE OF COLORADO, }
City and County of Denver, } ss.

WILLIAM H. ADAMS, being first duly sworn, upon oath deposes and says:

That he is the Governor of the State of Colorado and as such has read the petition for mandamus hereto annexed; that the allegations therein set forth are true to the best of his knowledge, information and belief.

WILLIAM H. ADAMS.

Subscribed and sworn to before me this 3rd day of February, A. D. 1932. My commission expires August 7, 1934.

ELIZABETH D. PATTEN,
Notary Public.

(Seal)

EXHIBIT A.

7000

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO
SITTING AT DENVER.

DOCKET ENTRIES.

IN THE MATTER OF THE PETITION OF HENRY DIERKS	Writ of Certiorari and Habeas Corpus Cum Causa.

Nov. 13, 1931	Petition for writ of Certiorari and Habeas Corpus Cum Causa.
" 13 "	Writ of Certiorari and Habeas Corpus Cum Causa and copy to Marshal.
" 19 "	Motion to quash, dismiss and remand.
" 20 "	Transcript from District Court of Arapahoe County.
" 20 "	Writ of habeas corpus cum causa returned executed by Marshal at Littleton on 11/14/31.
Dec. 30 "	Answer brief of the State of Colorado by Joel E. Stone, District Attorney for the First Judicial District.
Jan. 2, 1932	Brief of U. S. Attorney.
" 2 "	Memorandum opinion.
" 2 "	Order: Motion to quash and motion to remand, both denied.....63/475
" 4 "	Answer of Dist. Atty. (Joel E. Stone) to petition for writ of certiorari and habeas corpus cum causa.

7000

PLEAS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO SITTING AT DENVER.

BE IT REMEMBERED, that heretofore and on to-wit: the thirteenth day of November, A. D. 1931, came Ralph L. Carr, Esquire, United States Attorney for the District of Colorado, and filed in said Court a petition for a writ of habeas corpus cum causa on behalf of one Henry Dierks.

And the said petition is in the words and figures as follows, to-wit:

PETITION FOR REMOVAL AND ORDER OF COURT THEREON.

7000

FILED NOV. 13, 1931.
CHARLES W. BISHOP, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

PETITION OF HENRY DIERKS
for Writ of Certiorari and
Habeas Corpus Cum Causa.

Your petitioner shows this Honorable Court that on the ninth day of November, A. D. 1931, a criminal proceeding was commenced against your petitioner in the District Court for the First Judicial District of the State of Colorado sitting in and for the County of Arapahoe, by the filing of an information by the duly elected, qualified and acting District Attorney for said District, charging your petitioner with having, on the seventh day of November, A. D. 1931, at the County of Arapahoe and State of Colorado, feloniously, unlawfully, deliberately, premeditatedly, and of his malice aforethought, killed and murdered one Melford Smith, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Colorado.

That by virtue of said information so filed against your petitioner, a warrant, or capias, was issued, under which your petitioner was arrested on said charge and admitted to bail in the sum of Five Thousand Dollars, and that said criminal proceedings are still pending against your petitioner in said Court, and that no trial or final hearing thereof has been had.

That for a long time prior to November 7, 1931, and during all times mentioned in this petition, your petitioner was an officer appointed under and acting by authority of the revenue laws of the United States, to-wit, a United States

Prohibition Agent, regularly appointed and commissioned by the Bureau of Prohibition of the United States Department of Justice to enforce the laws and regulations relating to the manufacture, sale, transportation, control and taxation of alcohol, and of intoxicating liquors, under the authority vested in the Bureau of Prohibition by the Congress of the United States and the Attorney General.

That at the time the alleged act for which your petitioner was informed against was committed, he was, and still is, an officer appointed under and acting by authority of the revenue laws of the United States, and an officer of the United States, to-wit, a United States Prohibition Agent, and the act for which he was, and is, informed against, was performed while he was engaged in the discharge of the duties of his office as United States Prohibition Agent, and while he was acting by and under the authority of the Internal Revenue laws of the United States, and was done under and by right of his office, to-wit, as United States Prohibition Agent, and while he was engaged in the discharge of his official duties in making and attempting to make an investigation concerning a violation of the National Prohibition Act, and other Internal Revenue laws, and reporting the results of said investigation, and in protecting himself in the discharge of his duty as follows:

That on the seventh day of November, 1931, your petitioner, together with Federal Prohibition Agent, E. E. Ellsworth, was directed by John C. Richardson, United States Deputy Prohibition Administrator in Charge of Enforcement for the State of Colorado, to investigate a complaint of violations of the National Prohibition Act and other revenue laws, which violations were reported as being committed at Number 3005 South Broadway, in the City of Englewood, County of Arapahoe, State of Colorado.

That on the evening of said day, to-wit, November 7, 1931, at about 9:30 P. M., your petitioner, together with said Federal Prohibition Agent, E. E. Ellsworth, proceeded to said

address in the City of Englewood and County of Arapahoe, State of Colorado, for the purpose of investigating said reported violations of the National Prohibition Act and other Internal Revenue laws of the United States; that after arriving at said address, your petitioner, and the said United States Prohibition Agent, E. E. Ellsworth, observed that said premises numbered 3005 South Broadway, in the City of Englewood, County of Arapahoe, State of Colorado, was a place occupied and used as a hamburger stand or restaurant open to and catering to the public generally; that thereupon your petitioner entered said hamburger stand or restaurant, informed the proprietor, or man in charge thereof, that he, your petitioner, was a Federal Prohibition Agent, exhibited his Federal Prohibition Agent's badge, and advised the said proprietor, or man in charge, that he had come to investigate the reports of violations of the National Prohibition Act at said premises, and advised the said proprietor, or man in charge, that your petitioner desired to look around said premises, and that thereupon the said proprietor, or man in charge, gave your petitioner permission to search the premises.

That while your petitioner, as such Federal Prohibition Agent, was in the act of observing and searching said premises, one Melford Smith entered said hamburger stand or restaurant, walked to the rear of said hamburger stand or restaurant, seated himself on an unoccupied stool at the counter of said hamburger stand or restaurant, took out a pint bottle of wine from his inside coat pocket, and set the said bottle of wine on the counter in said premises, in full and open view of your petitioner, and the said Melford Smith then proceeded to look for a drinking glass.

That your petitioner thereupon, upon seeing said bottle of wine in the possession of the said Melford Smith in full and open view in said hamburger stand or restaurant, believing that the said Melford Smith was engaged in the violation of the National Prohibition Act and the Internal Revenue laws of the United States, proceeded to take possession of

said bottle of wine, and to arrest the said Melford Smith; that thereupon the said Melford Smith did resist arrest, did attempt to destroy said bottle of wine, and did proceed to assault your petitioner and did attempt to escape, and that thereupon one Al Green did attempt to assist the said Melford Smith to assault your petitioner, and to help the said Melford Smith to escape, and that in the scuffle that ensued, and while your petitioner was engaged in the discharge of his official duties as such Federal Prohibition Officer in making, and attempting to make, said arrest of said Melford Smith, and in protecting himself in the discharge of his duties, and in attempting to seize said bottle of wine, it became necessary in order to subdue the said Melford Smith for your petitioner to strike, and he did strike, the said Melford Smith on the head with your petitioner's gun; that thereupon Federal Prohibition Agent, E. E. Ellsworth, came to the assistance of your petitioner; and that your petitioner and Federal Prohibition Agent, E. E. Ellsworth, did arrest the said Melford Smith, the said Al Green, and one Leonard Carpenter, and did convey them to the City Jail of the City and County of Denver, and State of Colorado, where they were incarcerated pending the filing of charges against said named Melford Smith, Al Green and Leonard Carpenter, for a violation of the National Prohibition Act and for assaulting an officer of the United States.

That at the time said Melford Smith was placed in the City Jail of the City and County of Denver, he did not appear to have received any serious or other injury, but that on the following day the said Melford Smith became sick and died, and your petitioner is informed and upon information and belief alleges that the said Melford Smith did die from an injury to his head caused by a blow given to the said Melford Smith by your petitioner during the scuffle with your petitioner while the said Melford Smith was resisting arrest and attempting to destroy said bottle of wine and attempting to escape, as hereinbefore set forth.

That the said charge of murder, so filed, as hereinabove related, against your petitioner, is based entirely upon the circumstances surrounding the said injury and subsequent death of the said Melford Smith as hereinabove related; and that your petitioner does hereby state and allege that he is not guilty of the crime of murder, or any other offense, under the laws of the State of Colorado, or the United States of America; and that the said criminal proceeding so begun against your petitioner in said District Court of Arapahoe County and pending therein, arises out of and solely by reason of the acts performed by your petitioner as an officer acting by and under the authority of the Revenue Laws of the United States and the National Prohibition Act, while acting as a United States Prohibition Agent.

WHEREFORE, Your petitioner prays that said cause may be removed from the District Court of the First Judicial District of the State of Colorado, sitting in and for the County of Arapahoe, to the United States District Court for the District of Colorado, for trial, and that a writ of habeas corpus cum causa issue by this Honorable Court, directed to the said Court and the Clerk thereof, to bring to this United States District Court for the District of Colorado a transcript of the record and proceedings in said cause in that case in that Court to be dealt with by this Court according to law.

(Signed) Ralph L. Carr
RALPH L. CARR,
United States Attorney for the District of Colorado.

LET THE WRIT ISSUE: November 13, 1931.

(Signed) J. FOSTER SYMES,
District Judge.

UNITED STATES OF AMERICA,
District of Colorado. } ss.

HENRY DIERKS, of lawful age, being first duly sworn, on his oath deposes and says:

That he has read the above and foregoing petition, and knows the contents thereof to be true of his own knowledge, except as to those things set forth upon information and belief, and as to them he believes it to be true.

(Signed) HENRY DIERKS.

Subscribed and sworn to before me this 13th day of November, A. D. 1931.

CHARLES W. BISHOP,
Clerk of the U. S. District Court,

(Seal) By ELSIE PELISSIER,
Deputy Clerk.

CERTIFICATE.

I, RALPH L. CARR, United States Attorney for the District of Colorado, do hereby certify that I am attorney and counselor-at-law, admitted to practice before the Supreme Court of the State of Colorado, and before the United States District Court for the District of Colorado, and admitted to practice in the Court wherein the information described herein is pending, and that as counsel for the petitioner herein I have examined the proceedings against petitioner, mentioned in the foregoing petition, and have carefully inquired into all of the matters set forth in the said petition, and that I believe the same to be true.

(Signed) RALPH L. CARR,
United States Attorney for the District of Colorado, and Attorney for Petitioner.

ORDER OF REMOVAL, WRIT OF CERTIORARI AND HABEAS CORPUS CUM CAUSA.

7000

Filed Nov. 20, 1931

Charles W. Bishop, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

PETITION OF HENRY DIERKS FOR WRIT OF HABEAS CORPUS CUM CAUSA.	WRIT OF HABEAS CORPUS CUM CAUSA.

The President of the United States of America to Richard C. Callen, United States Marshal for the District of Colorado, Greeting:

You are hereby commanded to make known to the Clerk of the District Court of the First Judicial District of the State of Colorado, for the County of Arapahoe, Colorado, that whereas the defendant, Henry Dierks, now in Court has filed a petition before the undersigned, setting forth that an Information was filed against him in the District Court of Arapahoe County by Joel E. Stone, District Attorney for the First Judicial District of the State of Colorado, charging said defendant with the offense of the murder of Melford Smith; and, as the said Henry Dierks showeth in his said petition at the time of the alleged offense, he was an officer and employee of the United States Government, employed as a United States Prohibition Agent, assigned to the District of Colorado, and acting by his authority and by virtue of such did the act complained of.

AND, WHEREAS, he has demanded in his said petition the removal of the said Information into the District Court

of the United States for the District of Colorado, under Section 33 of the Judicial Code of the United States.

NOW, THEREFORE, you are commanded to make known to the said Clerk of the District Court of the First Judicial District of the State of Colorado by delivery of a copy hereof to the Clerk of said Court, or by leaving it at his office, that the said cause is hereby removed for trial into the said District Court of the United States now being held for the said District of Colorado, at Denver, Colorado.

And, that it is entered on the docket of said District Court of the United States, and will be proceeded with as a cause originally commenced in said Court; and, further, that it is required of said District Court of the State of Colorado, to send to the said District Court of the United States, distinctly and plainly under the seal of the said District Court of Arapahoe County, a transcript of the record and proceedings in said cause in that case, in that Court, with all the things touching the same, by whatever name the parties may be called, so that we may have them before the Judge of the said District Court of the United States at the time and place aforesaid, to-wit, at the November Term of the United States District Court for the District of Colorado, and not later than December 1, 1931; and, further, to do therefore what of right we shall see fit to be done.

Herein fail not, and have you then and there this writ.

WITNESS the Hon. J. Foster Symes, Judge of the District Court of the United States, this 13th day of November, A. D. 1931, and in the One Hundred and Fifty-sixth year of the independence of the United States of America.

(Seal U. S. District Court.)

(Signed) CHARLES W. BISHOP,
Clerk.

Received—U. S. Marshal's Office, Nov. 13, 1931—Crim. Docket No. 15142—P. 22, V. 16.

MARSHAL'S RETURN

UNITED STATES OF AMERICA,
District of Colorado. } ss.

I hereby certify and return that I have duly served the within writ of habeas corpus cum causa upon the Clerk of the District Court of the First Judicial District of the State of Colorado, for the County of Arapahoe, Colorado, by handing to and leaving a true and correct copy thereof with Pauline Ainsworth as such clerk, personally, at Littleton, in said District, on the 14th day of November, A. D. 1931, as within I am commanded.

R. C. CALLEN,
U. S. Marshal.

Marshal's Fees:
Service $2.00.

MOTION TO QUASH AND REMAND.

Filed Nov. 19, 1931

Charles W. Bishop, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 7000

PETITION OF HENRY DIERKS FOR WRIT OF CERTIORARI AND HABEAS CORPUS CUM CAUSA.	MOTION TO QUASH, DISMISS, AND REMAND.

JOEL E. STONE, District Attorney within and for the County of Arapahoe, State of Colorado, by virtue of the authority in him vested, in that behalf, respectfully moves this Honorable Court that the writ of habeas corpus cum causa, entered herein on, to-wit, the 13th day of November, A. D. 1931, be quashed, and the petition therefor to remove the cause herein referred to from the District Court of Arapahoe County, State of Colorado, to the District Court of the United States, for the District of Colorado, be denied and said cause be remanded to the aforesaid District Court of Arapahoe, State of Colorado, for the reasons hereinafter alleged:

1. Because it affirmatively appears from the records of this proceeding that the petition of the petitioner, Henry Dierks, was filed and the writ of habeas corpus cum causa issued ex-parte and that the Judge of the District Court of Arapahoe County, State of Colorado, and/or the District Attorney, within and for the First Judicial District of the State of Colorado, had no notice of the filing of the said petition or of the issuance of the writ of habeas corpus cum causa.

2. Because it affirmatively appears on the face of the writ of habeas corpus cum causa, issued by this Honorable Court, that this Honorable Court did not have jurisdiction of the subject matter of this action.

3. Because it affirmatively appears that this Honorable Court was without jurisdiction to issue said writ.

4. Because it affirmatively appears that said writ was issued by this Honorable Court upon the ground that the petition herein did establish that Henry Dierks was an officer and employee of the Government of the United States, employed as a Federal Prohibition Agent, assigned to the District of Colorado, and acting by his authority and by virtue of such did the act complained of, whereas said writ is wholly insufficient and fails to affirmatively allege or state any fact justifying the assumption of this Honorable Court and the issuance of the writ thereon.

5. Because it does not affirmatively appear from the writ of habeas corpus cum causa, or from the allegations of the petition, that the petitioner, Henry Dierks, was, at the time of the issuance of said writ, in confinement, or was being deprived of his liberty by virtue of any process issuing out of the District Court of the First Judicial District, within and for the State of Colorado, and it further appears from the said writ, as issued herein, that said writ was issued ex-parte.

6. Because it affirmatively appears on the face of the petition that this Honorable Court is without jurisdiction to herein determine the issues in said cause.

7. Because it affirmatively appears from the allegations of said petition that no controversy or dispute is presented by said proceeding wherein any law of the United States of America has been violated or a controversy or dispute exists over which this Honorable Court has jurisdiction.

8. Because it affirmatively appears from the allegations of said petition that this Honorable Court was without jurisdiction or legal right to order said cause removed from the District Court of Arapahoe County, Colorado, to the jurisdiction of the United States District Court for the District of Colorado.

9. Because it affirmatively appears from the allegations of

the petition that the allegations therein are insufficient to entitle the petitioner herein to have said cause removed, as ordered in said writ, as aforesaid.

10. Because it affirmatively appears from the allegations of said petition that the petitioner therein does not fully, fairly, and completely disclose facts entitling said petitioner to immunity from punishment by the State of Colorado, by reason of the fact that at the time of the commission of the offense, alleged in the information, said petitioner was justified by his duty under the Federal law in taking the life of the deceased, Melford Smith.

11. Because it does not affirmatively appear from the allegations of said petition that the petitioner, at the time of the commission of the crime alleged in said information, was doing nothing else upon which the prosecution of said petitioner for the crime alleged could be based.

12. Because it affirmatively appears from the allegations of the petition that at the time of the offense charged in said information the petitioner, Henry Dierks, was not acting within the scope of his authority as a Federal Prohibition Officer and had exceeded the rights, powers, and duties devolving upon him as such.

13. Because it affirmatively appears from the allegations of the petition that at the time of the offense charged in said information the petitioner, Henry Dierks, was engaged in an unlawful act beyond the scope of his authority as a United States Federal Prohibition Agent.

14. Because it affirmatively appears from the allegations of the petition that the petitioner, Henry Dierks, at the time of the crime charged in the information, was endeavoring and attempting to ascertain and discover whether or not a misdemeanor had been or was being committed by the deceased, Melford Smith.

15. Because it affirmatively appears from the allegations of the petition that at the time of the crime charged in the

information the petitioner, Henry Dierks, did kill and murder Melford Smith in an attempt to subdue and or arrest the said Melford Smith for the commission of an alleged misdemeanor.

16. Because it affirmatively appears from the allegations of the petition that at the time of the crime charged in the information the petitioner, Henry Dierks, was not acting within the scope of his authority as a Federal Prohibition Agent of the United States Government, in resisting an assault upon the person of the said petitioner, sufficient in law or in fact to entitle the said petitioner, Henry Dierks, to take the life of the deceased, Melford Smith.

17. Because it does not affirmatively appear from the allegations of the petition that at the time of the commission of the crime charged in the information the petitioner, Henry Dierks, had taken any steps or performed any act to avoid the alleged controversy, wherein and by reason whereof the said Melford Smith did lose his life.

18. Because it affirmatively appears from the allegations of the petition that the allegations of said petition are vague, indefinite, uncertain, and evasive and are not intended to and do not apprise and inform this Honorable Court fairly, fully and completely of all of the defenses of the petitioner, wherein and whereby said petitioner, Henry Dierks, would be entitled to immunity from punishment under the laws of the State of Colorado for the crime charged in the information by reason of his conduct as an officer in the Prohibition Department of the Government of the United States of America.

19. Because it affirmatively appears from the allegations of the petition that the petitioner, Henry Dierks, was acting upon mere suspicion that the deceased, Melford Smith, was engaged in the commission of a misdemeanor in violation of the laws of the State of Colorado or of the United States of America.

20. Because it affirmatively appears from the allegations of the petition that at the time of the crime charged in the in-

formation, the deceased, Melford Smith, was not under arrest by any properly constituted officer of the United States of America, and that the petitioner, Henry Dierks, had no legal authority to perpetrate any violence upon the said Melford Smith or to take his life.

21. Because it affirmatively appears from the allegations of the petition that the petitioner, Henry Dierks, did kill and murder one Melford Smith in violation of and contrary to the laws of the State of Colorado.

22. Because it affirmatively appears from the allegations of the petition that the District Court of Arapahoe County, within and for the State of Colorado, is the only properly constituted tribunal with the right and authority to hear and determine the matters alleged in the information referred to in the petition of the petitioner herein.

23. Because it affirmatively appears from the allegations of the petition that no allegation of fact is alleged in said petition, but the allegations therein set forth are mere conclusions of law and or facts of said petitioner.

24. Because it affirmatively appears from the allegations of said petition that no fact is alleged wherein this Honorable Court can find that the deceased, Melford Smith, was resisting arrest and or attempting to escape from a lawful arrest by or from any properly constituted officer of the United States of America.

25. Because it affirmatively appears from the allegations of said petition that the alleged crime charged to have been committed by the deceased, Melford Smith, would only be a misdemeanor, if and when committed.

26. Because it affirmatively appears from the allegations contained in the second paragraph on page 5 of petitioner's petition, and reading as follows:

> "That at the time said Melford Smith was placed in the City Jail of the City and County of Denver, he did not appear to have received any seri-

ous or other injury, but that on the following day the said Melford Smith became sick and died, and your petitioner is informed and upon information and belief alleges that the said Melford Smith did die from an injury to his head caused by a blow given to the said Melford Smith by your petitioner during the scuffle with your petitioner while the said Melford Smith was resisting arrest and attempting to destroy said bottle of wine and attempting to escape, as hereinbefore set forth."

that the petitioner, Henry Dierks, was and is guilty of the crime of murder under the laws of the State of Colorado, as charged in the information.

27. Because it affirmatively appears from the allegations of the petition that at no time was petitioner performing his alleged duty as a Federal Prohibition Officer by virtue of any legal warrant or disclosure of his identity as a Federal Prohibition Officer.

28. Because it affirmatively appears in said petition that the said Henry Dierks verified said petition under oath before the Clerk of the United States District Court for the District of Colorado.

29. That the petition does not allege, set forth, or state any fact or facts which constitute any defense to the crime of murder, as charged in the information, in violation of the laws of the State of Colorado.

30. That it does not affirmatively appear from the allegations of the petition that the petitioner, Henry Dierks, was assaulted in any manner.

JOEL E. STONE,
District Attorney within and for the First Judicial District of the State of Colorado.

ORDER OVERRULING MOTION TO QUASH AND REMAND

FORTY-SEVENTH DAY, NOVEMBER TERM, SATURDAY, JANUARY 2nd, A. D. 1932.

PRESENT: The Honorable J. Foster Symes, District Judge, and other officers as noted on the third day of November, A. D. 1931.

IN THE MATTER of 7000 The Petition of Henry Dierks	Writ of Certiorari and Habeas Corpus Cum Causa.

This cause came on to be heard on the motion of Joel E. Stone, Esquire, District Attorney for the County of Arapahoe, to quash the writ of *habeas corpus cum causa,* and the motion to remand this cause to the District Court of Arapahoe County and was argued by Ralph L. Carr, Esquire, United States District Attorney, appearing as solicitor for the petitioner and by Joel E. Stone, Esquire, appearing in his own proper person and by the Court taken under advisement.

And the Court having considered the same and being now fully advised in the premises:

It is ordered by the Court, for good and sufficient reasons to the Court appearing, that the said motions, and each thereof be, and the same are hereby denied.

EXHIBIT "B."

RECORD OF PROCEEDINGS OF THE DISTRICT COURT OF ARAPAHOE COUNTY, COLORADO, FILED IN THE UNITED STATES DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, NOVEMBER 20, 1931.

7000.

Filed November 20, 1931.
Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA.

STATE OF COLORADO,
Arapahoe County. } ss.

In District Court, October Term, A. D. 1931.

PLEAS before the Honorable S. W. Johnson, sole presiding Judge of the District Court of Arapahoe County, in the State of Colorado, at a term thereof begun and held at the Court House, in the Town of Littleton in said County, on the 9th day (being the 28th day) of November in the year of our Lord one thousand nine hundred thirty-one and of the Independence of the United States the one hundred and fifty-fifth.

Present, HONORABLE S. W. JOHNSON,
Judge.

JOEL E. STONE,
District Attorney.

JOHN M. HAYNES,
Sheriff.

Attest: PAULINE AINSWORTH,
Clerk.

Be it Remembered that heretofore and on the———— day of————, A. D. 19——, the same being one of the days of the————, A. D. 19——, Term of said————

Court, the following proceedings, inter alia, were had and done, to-wit:

STATE OF COLORADO, }
County of Arapahoe. } ss.

IN THE DISTRICT COURT.

THE PEOPLE OF THE STATE OF COLORADO

vs.

HENRY DIERKS.

At this day comes Joel E. Stone, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and asks and obtains leave of Court to file an information against the above named defendant for murder.

Thereupon it is ordered by the court that capias issue forthwith and that said defendant be let to bail herein with sufficient surety in the penal sum of $5,000.00, conditioned for his appearance in said Court, on the 14th day of November and from day to day thereafter and in default of such bail, said defendant be committed to the custody of the sheriff.

And thereupon came Joel E. Stone, District Attorney, on the 9th day of November, A. D. 1931, and filed herein his Information.

And said Information is in words and figures as follows, to-wit:

No. ————

IN THE DISTRICT COURT

THE PEOPLE OF THE STATE OF COLORADO

vs.

HENRY DIERKS.

INFORMATION FOR MURDER.

Permission given to file the within information this 9th day of November, 1931, and bail fixed at $5,000.00.

S. W. JOHNSON,
Judge.

WITNESSES FOR THE PEOPLE.

Lorenz Blyth.
Emer Nelson.
Mrs. Len Carpenter.
Chester Smith.
Mrs. Chester Smith.
J. M. Haynes, Sheriff.
James H. Cole, Undersheriff.
Jack Russell, Chief Police.
Earl Hastings, Deputy Chief Police.
Stanley Hill, Deputy Sheriff.
Dr. W. F. Dennis.
Bob Wilson.
Mary Clark.
Edna Foster.
Harold Whitefield.
Al Green.
Frank Colman.
Len Carpenter.
Joseph Godfrey.
Carl Garhifer.
Victoria Johnson.
Dr. Sickafoose.
Al Hively.
Frank Roshell.
Frank Moore.

INFORMATION

STATE OF COLORADO, }
County of Arapahoe. } ss.

IN THE DISTRICT COURT

FIRST JUDICIAL DISTRICT.

THE PEOPLE OF THE STATE OF COLORADO

Against

HENRY DIERKS.

JOEL E. STONE, District Attorney within and for the First Judicial District of the State of Colorado, in the name and by the authority of the said People of the State of Colorado, informs the Court that, on the 7th day of November, A. D. 1931, at the said County of Arapahoe, State of Colorado, Henry Dierks, feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, did kill and murder one Melford Smith, contrary to the form of statute in such case made and provided and against the peace and dignity of the People of the State of Colorado.

JOEL E. STONE,
District Attorney,

By EARL J. HOWER,
Deputy District Attorney.

STATE OF COLORADO, }
County of Arapahoe. } ss.

Jack Russell, upon oath, says: That the facts stated in the foregoing information, hereto attached, are true and that the offense therein charged was committed of this affiant's own personal knowledge.

JACK RUSSELL.

Subscribed and sworn to before me this 9th day of November, A. D. 1931.

PAULINE AINSWORTH,
Clerk District Court.

And thereupon Capias issued out of said Court, directed to the sheriff of Arapahoe County.

And afterwards and on to-wit the 10th day of November, A. D. 1931, came said defendant Henry Dierks and filed herein his bond. (Bond in the sum of $5,000.00, with two sureties thereon.)

And afterwards and on to-wit the 14th day of November, A. D. 1931, the Clerk of the District Court of said County was served with a Writ of Habeas Corpus Cum Causa by the United States Marshal for Colorado.

(Writ in words and figures as set out in Exhibit "A," pages 24-26.)

The Clerk of the District Court of Arapahoe County having been served with a Writ Habeas Corpus Cum Causa it is ordered by the Court that the Clerk prepare a Transcript of Proceedings for the use of District Court of the United States for the District of Colorado.

1. Order of Court.
2. Information.
3. Capias.
4. Bond.
5. Writ.
6. Order.

I, Pauline Ainsworth, Clerk of the District Court of Arapahoe County, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of Transcript of Proceedings in a certain cause pending in said Court, on the criminal side thereof, wherein the People of the State of Colorado is the Plaintiff and Henry Dierks is the Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Littleton, this 17th day of November, A. D. 1931.

PAULINE AINSWORTH.

(Seal—District Court,
Arapahoe County, Colo.)

UNITED STATES OF AMERICA, }
District of Colorado. } ss.

I, Charles W. Bishop, Clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of Petition of Henry Dierks; Writ of Habeas Corpus Cum Causa; Motion to Quash, Dismiss and Remand; Transcript of Proceedings of Arapahoe County as filed in the United States District Court; an order of Court and the Docket Entries, heretofore filed and entered of record in said Court, and in a certain case lately in said court pending, In the Matter of the Petition of Henry Dierks for a Writ of Certiorari and Habeas Corpus Cum Causa, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said Court, at the City and County of Denver, in said District this twenty-second day of January, A. D. 1932.

(Signed) CHARLES W. BISHOP,

(Seal) *Clerk.*

CERTIFIED COPY OF DOCKET ENTRIES, DISTRICT COURT OF ARAPAHOE COUNTY, COLORADO.

Names of Parties	Attorneys	Nature of Action
THE PEOPLE OF THE STATE OF COLORADO, *Plaintiff*, vs. HENRY DIERKS, *Defendant*.	JOEL E. STONE United States Attorney RALPH L. CARR	Murder

11/9/31	Order leave to file Information.
	Filing Information.
	Order to Issue Capias.
	Issuance of Capias.
	Filing Return of Capias.
	Order—Bail at $5,000.00.
	Approving Bond.
	Enter Appearance of Joel Stone.
	Acknowledgment of Information.
11/14/31	Filing Writ served on Clerk (Habeas Corpus Cum Causa).
11/14/31	Order of Clerk prepare Transcript for United States District Court.
	Transcript.

STATE OF COLORADO,
Arapahoe County. } ss.

I, Pauline Ainsworth, Clerk of the District Court of Arapahoe County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a record of the Register of Actions showing history of the case in a certain cause pending in said Court, on the criminall side thereof, wherein The People of the State of Colorado, Plaintiff, and Henry Hicks, Defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Littleton, this 25th day of January, A. D. 1912.

PAULINE AINSWORTH.

(Seal.)

FILE COPY

MAR 28 1932

IN THE

Supreme Court of the United States

19 Orig

STATE OF COLORADO

versus

J. FOSTER SYMES, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS ON BEHALF OF THE STATE OF COLORADO.

CLARENCE L. IRELAND,
Attorney General of Colorado,

GEORGE A. CROWDER,
Assistant Attorney General of Colorado,

Attorneys for the State of Colorado.

JOEL E. STONE,
District Attorney of Arapahoe County, Colorado,
Of Counsel.

THE BRADFORD-ROBINSON PTG. CO., DENVER

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STATE OF COLORADO, vs. J. FOSTER SYMES, Judge of the District Court of the United States for the District of Colorado, and the DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.	IN THE SUPREME COURT OF THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS ON BEHALF OF THE STATE OF COLORADO.

Statement of the Case.

On November 9, 1931, an information was filed in the District Court of the First Judicial District of the State of Colorado, in the County of Arapahoe, charging Henry Dierks, a United States Prohibition Agent with the murder upon November 7, 1931, of one Melford Smith, a resident of Arapahoe County, Colorado. (Ex. "A," p. 37, Petition for Writ of Mandamus.) The defendant was arrested upon a warrant and capias and admitted to bail in the sum of $5,000 upon the 10th day of November, A. D. 1931. (Ex. "A," p. 36.)

Thereafter, upon November 13, 1931, the defendant Henry Dierks filed a petition in the United States District Court for the District of Colorado, in Denver, asking that the cause be removed to the United States District Court of Colorado for trial and that a writ of certiorari and habeas corpus cum causa be issued, under the provisions of Section 33 of the Judicial Code. (Ex. "A," pp. 18-23.)

J. Foster Symes, Judge of the United States District Court upon the same day, to-wit, November 13, 1931, ordered the writ to issue. The writ of habeas corpus cum

causa was issued by the Clerk of the United States District Court on November 13, 1931. (Ex. "A," pp. 24 and 25.) It was served upon the Clerk of the District Court for the County of Arapahoe, Colorado, by the United States Marshal, upon the 14th day of November, A. D. 1931. (Ex. "A," p. 26.) The transcript of proceedings in the matter of the People of the State of Colorado vs. Henry Dierks was certified to the United States District Court at Denver, by the Clerk of the District Court of Arapahoe County upon November 14, A. D. 1931. (Ex. "B," p. 24.)

The petition sets forth that upon the day of the alleged murder, to-wit, November 7, 1931, the petitioner was an officer appointed under and acting by authority of the Revenue Laws of the United States, to-wit, a United States Prohibition Agent, and that the act for which he was and is informed against was committed while he was engaged in the discharge of his duties as a United States Prohibition Agent acting under and by authority of the Revenue Laws of the United States and the National Prohibition Act and in protecting himself in the discharge of his duties.

The petition further sets forth that upon the evening of November 7, 1931, the petitioner Henry Dierks, together with Prohibition Agent Ellsworth, was directed to investigate a complaint of a violation of the National Prohibition Law at 3005 South Broadway in the Town of Englewood, Arapahoe County, Colorado; that the petitioner and Ellsworth went to said location, a public restaurant or so-called "hamburger stand;" that the petitioner Dierks entered the place, informed the proprietor or man in charge that he was a federal prohibition agent, at the same time exhibiting his badge, stating that he had come to investigate alleged violations of the prohibition act, and that he desired to look around; that permission was granted by the proprietor to do so.

The petition further sets forth that while your petitioner was in the act of observing and searching the premises one

Melford Smith entered said hamburger stand or restaurant, walked to the rear of said hamburger stand, seated himself at a stool at the counter, took out a pint bottle of wine from his inside coat pocket and placed the bottle of wine on the counter in full view of your petitioner, and the said Melford Smith then proceeded to look for a drinking glass. Your petitioner seeing the bottle of wine in the possession of Melford Smith and believing that said Melford Smith was engaged in the violation of the National Prohibition Law, proceeded to take possession of said bottle of wine and to arrest Melford Smith. It further alleges, that thereafter the said Melford Smith did resist arrest, did attempt to destroy said bottle of wine and did proceed to assault your petitioner and did attempt to escape, and that thereupon one Al Green did attempt to assist the said Melford Smith to assault your petitioner and to help the said Melford Smith to escape; that a scuffle ensued while your petitioner was engaged in the discharge of his federal duties as such prohibition agent in making and attempting to make said arrest of said Melford Smith and in protecting himself in the discharge of his duties and in attempting to seize said bottle of wine it became necessary in order to subdue the said Melford Smith for your petitioner to strike and he did strike the said Melford Smith on the head with your petitioner's gun; that said prohibition agent Ellsworth came to the assistance of the petitioner and that they arrested Melford Smith and Al Green and one Leonard Carpenter and took them to the city jail of the City and County of Denver.

Petitioner Dierks further alleges that Melford Smith did not appear to have received any serious or other injury, but upon the following day Melford Smith became sick and died, and your petitioner upon information and belief alleges that Melford Smith died from the injury to his head caused by the blow given to said Melford Smith by your petitioner during a scuffle with the petitioner, while Melford Smith was

resisting arrest and attempting to destroy said bottle of wine and attempting to escape. (Ex. "A," pp. 18-23.)

Thereafter and upon November 9, 1931, Joe. E. Stone, District Attorney for the First Judicial District of the State of Colorado, filed in the United States District Court for the District of Colorado, a motion to quash and dismiss the writ and remand the cause to the District Court of Arapahoe County, Colorado. (Ex. "A," pp. 27-32.)

Oral argument upon the motion to quash and remand was heard by the United States District Judge J. Foster Symes upon the 4th day of December, 1931, at Denver, Colorado.

The Court upon January 2, 1932, announced and entered an order overruling the motion to quash and remand. (Ex. "A," p. 33.) Upon the same day, to-wit, January 2, 1932, Joel E. Stone, District Attorney for the First Judicial District of Colorado, asked leave of court to file an answer, which was granted. Thereafter upon the 4th day of January, 1932, the answer was filed but no evidence heard. (Ex. "A," Docket Entry, p. 16.)

The State of Colorado, asks the Supreme Court of the United States, in its petition for a writ of mandamus to direct J. Foster Symes, Judge of the District Court of the United States for the District of Colorado, to remand the case to the District Court for the County of Arapahoe, State of Colorado.

ARGUMENT.

I.

A writ of mandamus lies to compel the United States District Court to remand a criminal prosecution to the state court in the absence of any other remedy.

II.

The scope of Section 33 of the Judicial Code.

A. Removal acts are strictly construed. They are not enlarged by construction.

III.

A petition for removal under Section 33 of the Judicial Code must set forth all the facts and circumstances, and that the same constitute a defense of immunity from punishment by the State.

IV.

Possession of intoxicating liquor is a misdemeanor under the laws of the United States and of the State of Colorado.

V.

Constitutional and statutory provisions regarding alleged offenses arising out of a lawful arrest.

VI.

What force may a federal prohibition agent or officer use in arresting a person for an alleged violation of a misdemeanor?

VII.

A petition based upon mere recitals and conclusions does not fully advise the court conformably to the rules of good pleading, and is insufficient in law to warrant the removal, under section 33 of the Judicial Code.

VIII.

Conclusion.

I.

A writ of mandamus lies to compel the United States District Court to remand a criminal prosecution to the state court in the absence of any other remedy.

The jurisdiction is conferred by Section 688 of the Revised Statutes (Second Edition, 1878), pages 127-128; Act 24 Sept., 1789, c. 20, s. 13, v. 1, p. 80; Judicial Code, Section 234; (Act March 3, 1911, c. 231, s. 234; 36 St. 1156), which reads, in part, as follows:

> "The Supreme Court shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any Courts appointed under the authority of the United States, or to persons holding office uder the authority of the United States, *where a State * * * is a party.*"
>
> *United States Compiled Statutes,* 1916, Annotated, Vol. 2, Sec. 1211, pp. 1567; 1570-1579;
>
> Ibid, 1919 Supplement, Vol. 1, pp. 214-215.

See also:

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667, 3 Am. Crim. Rep. 524;

Virginia v. Paul, 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. Rep. 636;

Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692;

Ex parte Harding, 219 U. S. 363-373;

Ex parte Bradley, 7 Wall. 364, 376.

In *Maryland v. Soper,* 270 U. S. 9, 46 Sup. Ct. 185, 70 L. Ed. 149, Chief Justice Taft, giving the opinion of the court, at pages 29 and 30 said:

> "It may be conceded that there are substantial differences between Virginia v. Paul, Virginia v. Rives, and Kentucky v. Powers, and this case. But we do not think that those differences should prevent the issue of the mandamus here. In respect of the removal of state prosecutions, there should be a more

liberal use of mandamus than in removal of civil cases. We exercise a sound judicial discretion in granting or withholding the writ. It may be 'in cases warranted by the principles and usages of law.' Rev. Stats., Sec. 688; Ex parte Bradley, 7 Wall. 364, 376; Virginia v. Rives, supra, at page 323, separate opinion of Mr. Justice Field, ibid, at p. 329. It is granted in analogy to the intervention of equity to secure justice in the absence of any other adequate remedy. Duncan Townsite Co. v. Lane, 245 U. S. 308, 312. *In the case before us and in all state prosecutions removed under Section 33, the jurisdiction of the courts of a State to try offenses against its own laws and in violation of its own peace and dignity is wrested from it by the order of an inferior federal court.* The State by its petition for mandamus becomes a suitor at the bar of this Court to challenge the legality of the inferior court's action. Conceding the validity of the exceptional use of the national supremacy in a proper case, it seeks by this writ to test its propriety here. Except by the issue of mandamus, it is without an opportunity to invoke the decision of this Court upon the issue it would raise. The order of the United States District Judge refusing to remand is not open to review on a writ of error, and a judgment of acquittal in that court is final. United States v. Sanges, 144 U. S. 310; Virginia v. Paul, supra, at p. 122. The fact that the United States District Court may be proceeding in the exercise of a lawful jurisdiction should not, under such exceptional circumstances, prevent this Court from extending to the State the extraordinary remedy." (Italics ours.)

The foregoing statute and citation of authorities conclusively show that the only remedy open to the State of Colorado, in the exercise of its sovereign right to try the defendant Henry Dierks in a court of this state for a violation of its laws, is by a petition for writ of mandamus to the Supreme Court of the United States.

II.

The scope of section 33 of the Judicial Code.

A. Removal acts are strictly construed. They are not enlarged by construction.

The original act of removal of March 2, 1833, 4 Stat. 633, Sec. 57, Paragraph 3, applied to officers in the revenue service of the United States, and was enacted at the time of the attempted nullification of the national customs and revenue laws in South Carolina. It was adopted for the purpose of securing the effective enforcement of federal laws by preventing interference in communities wherein prejudice existed against the operation of the revenue laws. It was limited to those persons acting under color of authority vested in them by reason of their federal employment. It applied only to the acts of revenue agents, or other persons under such law, while engaged in the performance of their duties. It was not intended to hinder or embarrass the states in the prosecution of offenses against the states, and over which they had original and exclusive jurisdiction.

Section 28 of Title 2 of the National Prohibition Act provided that the commissioner, his assistants, agents, inspectors and all other officers of the United States whose duty it is to enforce criminal laws shall have all the power and *protection* in the enforcement of the act or any provision thereof which is conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors and other laws of the United States.

"Congress not without reason" assumed that the enforcement of the National Prohibition Act was likely to encounter opposition and lack of sympathy. Hence prohibition agents are entitled to the same protection as that extended to agents of the government engaged in the collection of customs and internal revenues.

Such agents are subject to the same obligations and duty to society and liability for acts committed, beyond the scope of their authority and color of office and not justified

by their federal duty. A prohibition agent seeking the protection of Section 33 of the Judicial Code for an alleged act committed against the state must necessarily plead all the facts and circumstances in his petition which may be reasonably interpreted by the court to constitute a defense of immunity from punishment by the state. The adoption of the National Prohibition Act does not in any sense enlarge or extend, under Section 33 of the Code, special protection to prohibition agents. The effective enforcement of the National Prohibition laws does not mean the sacrifice of the effective enforcement of the state laws.

That Section 33 of the Judicial Code has not been extended or the construction enlarged to cover offenses committed by officers of the United States beyond the scope of their authority or color of office and not justified by their federal duty, is borne out in the case of Maryland vs. Soper (No. 2) 270 U. S. page 43, 46 Sup. Ct. 185, where it is said:

> "In answer to the suggestion that our construction of Sec. 33 and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operations of Section 33, we can only say that, if prosecutions of this kind come to be used to obstruct seriously the enforcement of federal laws, it will be for Congress in its discretion to amend Section 33 so that the words 'on account of' shall be enlarged to mean that any prosecution of a federal officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of federal laws, may be removed for trial to the proper federal court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of Section 33 can not be broadened by fair construction to give it such a meaning."

There is no reference in the petition to any prejudice existing in the State of Colorado and more particularly in the County of Arapahoe against the effective operation of

the National Prohibition Law. The State has made ample provision by law for a defendant to secure a change of venue to another county where local prejudice exists against the individual. (Section 6617, Compiled Laws of Colorado, 1921.)

III.

A petition for removal under section 33 of the Judicial Code must set forth all the facts and circumstances, and that the same constitute a defense of immunity from punishment by the state.

The Supreme Court of the United States in the case of *Maryland v. Soper,* (No. 1) 270 U. S. 9; 46 S. Ct. 185, 70 L. Ed. 449, has fully outlined the necessary elements of a petition seeking a removal under Section 33 of the Judicial Code. Chief Justice Taft, in deciding the case, at page 33, stated:

> (1) "The prosecution to be removed under the section must have been instituted 'on account of' acts done by the defendant as a federal officer under color of his office or of the revenue or prohibition law."
>
> (2) "There must be a causal connection between what the officer has done under asserted official authority and the state prosecution."
>
> (3) "It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, *and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty.*" (Italics ours.)

The court continues on page 34:

> (4) "In invoking the protection of a trial of a state offense in a federal court under Section 33, a federal officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him out of which the prosecution arose."
>
> (5) "The defense he is to make is that of his im-

munity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based."

(6) "He must establish fully and fairly this defense by the allegations of his petition for removal before the federal court can properly grant it."

(7) "It is incumbent on him, conformably to the rules of good pleading, to make the case on which he relies, so that the court may be fully advised and the state may take issue by a motion to remand."

And further on page 35:

(8) "The petitioner must negative the possibility that he was doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by him leading to the prosecution was done under color of his federal official duty.

(9) "In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer." (Numbers ours.)

The opinion of the court is a clear and concise statement of the law.

The adoption of the 18th amendment and the national prohibition laws in pursuance thereof have brought about many alleged offenses committed by federal prohibition agents against the laws of the states. Where a federal court has erroneously interpreted the sufficiency of a petition for removal and the scope of Section 33 of the Judicial Code, the State should have an opportunity of presenting the cause to the Supreme Court of the United States for redress.

The removal of a criminal prosecution to the Federal Court upon an insufficient statement of fact is, at least, violative of precedent and established law, as announced by this court.

Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, was decided in 1879. The petition for removal set forth fully and fairly the facts upon which Davis sought the removal from the state court of Tennessee to the circuit court of the United States. Davis was charged with murder and in the petition admitted that he had been indicted for the charge, *but alleged that the killing was done in necessary self-defense to save his own life;* that he was an officer of the United States; that while acting in his own necessary self-defense he was engaged in the discharge of his duties in seizing the illicit distillery and apparatus; that *he was assaulted* and *fired upon by a number of armed men and that in defense of his life he returned the fire.*

The above case clearly shows that all of the facts were set forth in the petition and all the necessary elements of self-defense well pleaded, showing that the defendant was assaulted and fired upon by armed men and that in committing the act he was justified by his federal duty and in protection of his life.

In 1879, this court in the case of *Virginia v. Rives,* 100 U. S. 313, 25 L. Ed. 667, 3 Am. Crim. Rep. 524, announced the rule regarding the sufficiency of a petition for removal. (Chief Justice Taft, in the opinion of *Maryland v. Soper,* (No. 1) *supra,* at page 29, refers to the separate opinion of Mr. Justice Field, in Virginia v. Rives, supra), Mr. Justice Field stated at page 332:

> "So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; *if it were so, few prosecutions would be retained in a State court for insufficient allegations when the accused imagined he would gain by the removal. Texas v. Gaines,* 2 Woods 344. There must be such a presentation of facts as to lead the court to the conclusion that the averments of the accused are well founded." (Italics ours.)

In 1882, in the case of *Davis v. South Carolina,* 107 U. S.

597, 27 L. Ed. 572, 2 Sup. Ct. Rep. 636, the defendant Davis was indicted for the murder of one Hall in the State court of South Carolina. He petitioned the circuit court of the United States of South Carolina for a writ of *habeas corpus cum causa* and set forth in his petition that in February, 1876, he was detailed to serve as one of a guard of United States soldiers to aid a deputy marshal in making the arrest of Hall under a warrant; that the guard proceeded to the house and surrounded it; that Hall made his escape through a hole in the side of the house near where petitioner was standing and sprang passed him, frightening his horse and accidentally discharging his gun, whereby Hall was killed; that the petitioner at the time of the accident was in the discharge of his duty; that said shooting of said Hall was purely accidental, and that the petitioner was in no way responsible.

The defendant Davis plead every detail in his petition for removal, clearly outlining the defense of immunity from punishment by the State.

In the case of *Virginia v. Paul,* 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. Rep. 636, Mr. Justice Gray delivered the opinion of the court, and on pages 122 and 123, stated:

> "A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the Judge who has lawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by Virginia v. Rives, 100 U. S. 313, 316, 323, 324."

See also:

> *Kentucky v. Powers,* 201 U. S. 1, 50 L. Ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692.

In compliance with the decision in the case of *Maryland v. Soper, supra,* that the District Judge would be at liberty to permit another amendment to the petition for removal, by averments necessary to bring the case within Section

33, an application was made by the defendants, for leave to file an amended petition and the state opposed the right to amend. *State of Maryland v. Ford, et al.* 12 Fed. (2d) 289, at page 290, Judge Soper said:

> "In marked contrast, the allegations of the present amended petition are full, definite, and precise."

An analysis of this case is most convincing that all of the facts and circumstances must be set out so that the court may determine that the statements and facts are well founded. (See opinion of Mr. Justice Field in Virginia v. Rives, supra.)

We further contend that Judge Soper placed an erroneous interpretation upon, and is contrary to, the decision of Chief Justice Taft in the case of *Maryland v. Soper, supra,* Judge Soper saying at page 291:

> "In regard to the first point, it may be said that it is not necessary, in order to justify a removal, that the agents show in their petition that the homicide, if committed by them, was justified under the law. The order of removal does not determine either the guilt or innocence of the accused, but merely that the prosecution is based upon their official Acts."

Such an interpretation ignores Chief Justice Taft's opinion, to-wit, that the defense the petitioner is to make is that of immunity from punishment by the state, *because what he did was justified by his duty under the federal law and he did nothing else upon which the prosecution could be based.*

In passing upon the sufficiency of the petition for removal, it is not the province of the Court to determine the guilt or innocence of the defendant, but is purely a question of law. The situation is analogous to the court passing upon the sufficiency of an indictment and is likewise a question of law. The petitioner cannot disclose a part of the facts and then conceal those facts and circumstances surrounding the actual killing, and more particularly when he admits the taking of life.

The opinion by Judge Soper in *Maryland v. Ford, supra,* that the mere presence of a government agent at the place of the alleged offense in the performance of his official duties is sufficient to meet the requirements of a petition for removal, particularly when the petitioner admits having taken the life of a citizen, is contrary to the established law.

If an officer being present and not participating in the actual killing and not knowing that a killing had taken place and being charged with the offense upon seeking a removal from the federal court, he would be required to set forth those facts showing what he did. This is fully illustrated by Chief Justice Taft in *Maryland v. Soper, supra,* page 33.

In the case of *People of the State of New York v. Walsh, et al.,* 40 Fed. (2d) 58, criminal prosecution was removed from the state court to the United States District Court. Motion to remand was denied. Grounds of motion was insufficiency of petition. The facts in this case clearly show that Walsh and others while acting as prohibition agents were guarding and taking care of a dismantled still and alcohol and were assaulted by certain persons while in the performance of their duties, and that Walsh was badly injured. The court held at page 62: "The petition does set forth fully, and with sufficient detail to make it clear, that, if their petition is true, they were assaulted, and Walsh badly injured." This case is clearly distinguished from the one at bar, because the prohibition agents were actually assaulted and Walsh badly injured while in the performance of their duty, and the petitioner for removal indicates that the prohibition agents were attacked by several persons, and under those circumstances they had the right to repel such assault. Other facts indicate that the officers were known to the persons making the assault, so that this case is not in point so far as it affects the sufficiency of the petition in the instant case.

In the case of *State of Rhode Island v. Richardson,* 32

Fed. (2d) 301, the defendant was a federal prohibition agent and indicted in a state court for conspiracy to steal property. Upon petition the case was removed to the United States District Court for trial. A motion to remand was denied. The facts and circumstances of the case are not relevant to or in point with the instant case. The report does not disclose the nature of the petition other than that testimony was introduced in the hearing before the court and in no way involves an alleged assault upon the officer or charge of murder arising out of the alleged arrest.

IV.

Possession of intoxicatiug liquor is a misdemeanor under the laws of the United States and of the State of Colorado.

The laws of the United States provide—Sections 12 and 46, Title 27, Intoxicating Liquor, U. S. A. C., to-wit:

> "Sec. 12. No person shall * * * possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed * * *." (Oct. 28, 1919, c. 85, Title II, Sec. 3, 41 Stat. 308.)
>
> "Sec. 46. Any person who * * * violates any of the provisions of this chapter * * * for which offense a special penalty is not prescribed shall be fined for a first offense not more than $500; * * *." (Oct. 28, 1919, c. 85, Title II, Sec. 29, 41 Stat. 316.)

Possession of intoxicating liquor under the laws of Colorado is a misdemeanor. Section 3701, Compiled Laws of Colorado, 1921, provides, inter alia, as follows:

> "No person * * * shall keep or have in his possession, for personal use or otherwise, any intoxicating liquors * * *," except as provided by law.

Section 3722, Compiled Laws of Colorado, 1921, provides:

> "Any person * * * who shall violate any of the provisions of this act, shall for the first offense be deemed guilty of a misdemeanor * * *."

There is no offense for attempting to destroy intoxicating liquor under the laws of Colorado, although Section 3712, Compiled Laws of Colorado, 1921, provides:

> "* * * If fluids are poured out, or otherwise destroyed, manifestly for the purpose of preventing their seizure, said fluids shall be held to be prima facie intoxicating liquors * * *."

The contention may be made that the deceased Melford Smith violated Section 121, Title 18, Criminal Code and Procedure, U. S. C. A. (R. S. Sec. 5447; Mar. 4, 1909, c. 321, Sec. 65, 35 Stat. 1100.)

Only actual destruction of the evidence of intoxicating liquor already seized is a misdemeanor under this section which reads as follows: Sec. 121, supra:

> "Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer of the customs or of the internal revenue, or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches and seizures, in the execution of his duty, or shall rescue, attempt to rescue, or cause to be rescued, any property which has been seized by any person so authorized; or whoever before, at, or after such seizure, in order to prevent the seizure or securing of any goods, wares, or merchandise by any person so authorized, shall stave, break, throw overboard, destroy, or remove the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any person authorized to make searches or seizures, in the execution of his duty, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duty, shall be imprisoned not more than ten years."

A careful reading of the petition fails to disclose that the deceased in any manner assaulted or forcibly assaulted or forcibly resisted or forcibly opposed the petitioner, or that the petitioner ever actually seized or had possession of the intoxicating liquor. The petition does not allege

that the deceased destroyed the wine but that the deceased attempted to destroy the wine.

In several cases where indictments have been brought under this section the facts disclose that the officer alleged to have been assaulted was either known to the person charged with the crime or that the officer disclosed his identity.

Keiley v. U. S., (C. C. A. Md. 1923) 293 Fed. 689;
Gay v. U. S., (C. C. A. Fla. 1926) 12 Fed. (2d) 433.

In the case of *United States v. Page*, 277 Fed. 459, the court states:

> "An indictment under this section (121) for forcibly assaulting and resisting an officer in the performance of his duty must allege that accused knew that the person assaulted was an officer."

In *Bray v. U. S.* (C. C. A. S. C. 1923) 289 Fed. 331, the court held that it was relieved from any inquiry as to whether or not the defendant had any knowledge of the official character of the officer since the defendant admitted he knew that Smith was a revenue officer. Further the court held on page 332:

> "Under the indictment, there was no other offense of a lesser degree of which the defendant could have been convicted. The federal courts have no common-law criminal jurisdiction * * *. The only federal statute providing for the punishment of common assault is found in section 276 of the Criminal Code (Comp. St. Sec. 10449) and its application is expressly limited to assaults committed in places within either the exclusive or the admiralty jurisdiction of the United States."

See also:

Brown v. United States, 47 Fed. (2d) 681.

Notes, Sec. 121, Criminal Code, Title 18, p. 305, U. S. C. A.

V.

Constitutional and statutory provisions regarding alleged offenses arising out of a lawful arrest.

Article XVIII, Section 4, of the Constitution of the State of Colorado, provides:

> "The term felony, wherever it may occur in this constitution, or the laws of the state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and none other."

An attempt to resist a lawful arrest where the officer has a warrant is a misdemeanor. Section 6793, Compiled Laws of Colorado, 1921, provides, in part, as follows:

> "If any person shall knowingly and wilfully * * * oppose any sheriff * * * or other officer of this state, or other person duly authorized in serving or attempting to serve any lawful process or order of any court * * * or shall assault or beat any sheriff * * * or other officer * * * every person so offending shall be fined in a sum not exceeding five hundred dollars, * * *."

An assault is a misdemeanor under the laws of Colorado. Section 6697, Compiled Laws of Colorado, 1921, provides:

> "An assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another." (Penalty Section 6699, supra.)

Section 6698, Compiled Laws of Colorado, 1921, provides, in part, as follows:

> "An assault with intent to commit murder * * * shall subject the offender to confinement in the penitentiary for a term of not less than one year nor more than fourteen years. An assault with a deadly weapon, instrument or other thing, with an intent to commit upon the person of another a bodily injury where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant heart, shall be adjudged to be a high misdemeanor, and any person thereof duly convicted shall be fined in a sum not exceeding two thousand dollars and imprisoned not exceeding one year in the county jail."

Assault and battery is a misdemeanor under Section 6699, Compiled Laws of Colorado, 1921:

> "Assault and battery is the unlawful beating of another. Every person convicted of assault, or of assault and battery (penalty under Section 6697) shall be punished by imprisonment in the county jail for a term not exceeding six months, or fine not exceeding one hundred dollars."

Aiding escape from officer. Section 6806, Compiled Laws of Colorado, 1921, provides:

> "If any person shall aid or assist any prisoner to attempt to escape, or shall rescue or shall attempt to rescue any prisoner from the custody of any sheriff, deputy sheriff, coroner, constable, officer or other person who shall have the lawful custody of such prisoner, every person so offending shall, on conviction thereof, be fined not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year."

VI.

What force may a federal prohibition agent or officer use in arresting a person for an alleged violation of a misdemeanor?

The general rule of law as to what force an officer may use when arresting for a misdemeanor is cited by 5 *C. J.*, pages 426-427, Secs. 62 and 63, and notes:

> "Sec. 62. Except in self-defense an officer has no right to proceed to the extremity of shedding blood in arresting or in preventing the escape of one whom he has arrested, for an offense less than felony, even though the offender cannot be taken otherwise, a distinction being recognized in this respect between arrests for misdemeanors and arrests for felonies. Some cases take a contrary view and hold that the officer has a right to kill if necessary to effect an arrest for misdemeanor equally as in the felony, and repudiate the idea that this right to kill is in any way based on the right of self-defense."
>
> "Sec. 63. If the officer is assaulted he is not bound

to fly to the wall, but if necessary to save his own life, or to guard his person from great bodily harm, he may even kill the offender; this rule applies, although the arrest is being made for a misdemeanor."

See also:

2 R. C. L., page 470.
State v. Sigman, 106 N. C. 728, 11 S. E. 520; *infra.*
Petrie v. Cartwright, 114 Ky. 103, *infra.*
United States v. Kaplan, 286 Fed. 963.
Commonwealth v. Micuso, 273 Pa. 474, 117 Atl., pages 211, 212.

The defendant, Henry Dierks, alleges that he was protecting himself in the discharge of his duties when the act was committed, which is not a sufficient allegation in law or otherwise to constitute a defense of immunity upon the grounds of self-defense. There is not an allegation of fact or circumstance that the defendant, Henry Dierks, was compelled to and did take the life of Melford Smith because he, Henry Dierks, believed he was in danger of receiving great bodily harm or death at the hands of his assailant, Melford Smith, or any harm or injury.

Killing in self-defense. Section 6675, Compiled Laws of Colorado, 1921, provides:

"If a person kills another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm the killing of the other was absolutely necessary. And it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

In *Maryland v. Soper* (No. 2) *supra*, at page 42, it is said:

"Thus removals of prosecutions on account of acts done in enforcement of the revenue or prohibition laws or under color of them properly include those for acts committed by a federal officer in defense of his life, threatened while enforcing or attempting to

> enforce the law. Such acts of defense are really part of the exercise of his official authority. They are necessary to make the enforcement effective."

In the case of *Campbell v. The People* (1913), 55 Colo. 302, 133 Pac. 1043, the defendant was a policeman in the City of Denver. The officer confronted one William Bell and Roy Blackford, asking them what they were doing. Bell replied he was looking for work. Harry Blackford, a brother of Roy, heard the conversation and came up to the officer, who took hold of Harry Blackford and threw him on the steps. Roy Blackford remonstrated and Campbell hit him on the head with his club. Campbell contended this was necessary in order to prevent the escape or rescue of the other two, claiming that they were under arrest at the time. The question involved was, what force may a policeman use in order to prevent the rescue of a prisoner. *The defendant contended that he struck the deceased to subdue him and to protect himself.* At page 307, the court cites Section 1635, Revised Statutes, 1908, which is Section 6676, Compiled Laws of Colorado, 1921:

> "If an officer in the execution of his office in a criminal case, having legal process, be resisted and assaulted, he shall be justified if he kill the assailant. If an officer or private person attempted to take a person charged with treason, murder * * * or other crime denominated felony by the common law, and he or they be resisted in the endeavor to take the person accused, and to prevent the escape of the accused by reason of such resistance, he or she be killed, the officer * * * so killing shall be justified, providing that such officer or private person previous to such killing shall have used all reasonable efforts to take the accused without success, and that from all probability, there was no prospect of being able to prevent injury from such resistance, and the consequent escape of such accused person."

Thus in the arrest of an alleged felony even with legal process, an officer of the law cannot take human life if resisted in making the arrest, unless such officer has used all

reasonable means to take the accused, but without resorting to the extremity of killing. Mr. Justice Gabbert, on page 307, said:

> "The defendant had the right to use such force as was reasonable and apparently necessary to retain the custody of the parties he had arrested; but the law does not clothe an officer with authority to judge arbitrarily of the necessity of killing a person to prevent the rescue of a prisoner."

Again, on page 38, the court said:

> "When a peace officer takes a human life in circumstances which the law does not justify, he cannot take shelter behind his character, and claim that he was acting in his official capacity."
>
> "* * * The unjustified use of an instrument on a part of the body of one killed thereby in a manner calculated to take human life tends to prove malice aforethought of the slayer."

The petitioner in the case at bar has not alleged misadventure or accident nor is it manifest in the allegations of the petition that the petitioner did not intend to mortally wound the deceased by striking him upon the head with a deadly weapon.

In *Starr v. United States* (1893), 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919, Chief Justice Fuller, at page 623, said:

> "Whether the right of self-defense is legitimately exercised, *depends upon the circumstances of the particular transaction,* and we take it that the possession of a conscience void of offense toward God and men is not an indispensable perquisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation on the right to repel it."

Further, at page 624:

> "The motive of the accused in being where he was

had nothing to do with the question of his right of self-defense in itself, and the unlawfulness of his previous conduct formed in itself no element in the solution of that question, but was to be considered only in so far as it threw light on his belief that his arrest was sought by the officer."

What deadly peril and imminent danger or serious injury confronted the petitioner in the instant case to cause him to strike Melford Smith on the head with a gun, causing his death? Let the facts be set forth. The nature of the offense alleged to have been committed by Melford Smith—a misdemeanor and minor infraction of the law—can best be measured and judged by the picture of the deceased seated at the counter of a hamburger stand with a pint bottle containing wine and about to reach for a glass when the prohibition agent whose presence and identity was unknown to the deceased suddenly attempted to seize the bottle.

The general principle of law where an officer making an arrest is justified in using such force as is reasonably necessary to secure and detain the offender, is set forth in 5 C. J., at page 424, Section 59, and notes:

"An officer who is making a lawful arrest, or has made an arrest, is justified in using such force as is reasonably necessary to secure and detain the offender, overcome his resistance, prevent his escape, recapture him if he escapes, and to protect himself from bodily harm; but he is never justified in using unnecessary force or treating his prisoner with wanton violence, or in resorting to dangerous means when the arrest could be effected otherwise. But within reasonable limits the amount of force and the means employed are necessarily left to the sound discretion of the officer, and this discretion is not subject to review by a court or jury unless wantonly or maliciously abused. The officer is not required to determine at his peril the precise amount of force necessary in each instance and to use that much and no more."

See also:

2 R. C. L., page 463.

In 1861 the territorial legislature recognized the humane principle of law that an officer should not assault or beat any individual under the color of his commission or authority without lawful necessity so to do, and this law has been in effect ever since its inception, to-wit, Section 6793, Compiled Laws of Colorado, 1921, which reads, in part, as follows:

> "* * * Any officer or person whatever, that may or shall assault or beat any individual under color of his commission or authority, without lawful necessity so to do, shall, on conviction, suffer the same punishment."

In the case of *People of State of Colorado, for Use of Little v. Hutchinson, et al.*, 9 Fed. (2d) 275 (8th Circuit, 1925), the facts show that Sheriff Hutchinson of Chaffee County, Colorado, without warrant, attempted to arrest the plaintiff Little while she was driving through the town of Buena Vista in an automobile. The sheriff was looking for a stolen car and attempted to stop the plaintiff, jumping upon the running board of the car, and shot the plaintiff in the knee. The sheriff claimed that the gun was accidentally discharged. The trial court rendered judgment for the defendant. The circuit court reversed the decision.

Circuit Judge Kenyon delivered the opinion and on page 276 said:

> "* * * Under the complaint this action narrows down to the one vital question, viz: Did defendant use excessive force in making the arrest? And a secondary question: Was this, under the evidence, for the jury to determine?
>
> "In some states statutes seek to control the action of officers in making arrests. *Section 6793 of Colorado Compiled Laws of 1921 provides for a penalty in case an officer shall assault or beat an individual under color of his commission or authority without lawfull necessity so to do.* Regardless of statutes, however, officers do not have absolute license to use any force they may choose in making arrests. There must, of course, be a discretion in an officer as to the force necessary to

be used on such occasions; but officers are sometimes inflated with a high conception of their office, and exercise power in an unreasonable, arbitrary and unjustifiable manner. Officers are not relieved from the ordinary dictates of humanity. While they are clothed with great power, they have no right to abuse the same. An officer who intentionally uses more force than is reasonably necessary in making an arrest is oppressively discharging the duties of his office. What amounts to reasonable force depends upon the facts of each particular case, and is ordinarily a question of fact for the jury. This court laid down the rule in Castle v. Lewis, Sheriff, 254 F. 917, 925, 166 C. C. A. 279, 287, as follows: 'Conceding, for the purpose of considering this issue only, that the petitioners were authorized to arrest the occupants of Mays' car without a warrant for the felony of introducing liquor into Osage county, that authority included the lawful power to use such force as they then had reasonable cause to believe, and in the exercise of their sound discretion they did honestly believe, was necessary to make the arrest; but it included the right to use no more, and the use of any greater force was beyond the scope of their authority, unauthorized, and without justification. Here, too, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary." (Italics ours.)

The court also quoted from 5 C. J., page 424, sec. 59.
The court further said:

"In Goold v. Saunders, et al., 196 Iowa 380, 384, 194 N. W. 227, 229, the Supreme Court of Iowa, referring to the statutes of that state providing that no unnecessary force or violence should be used in making an arrest, said: 'In the construction of these statutes we have uniformly held that the criterion of reasonable ground of belief and of the degree of force which may properly be used in making an arrest is that which a reasonably prudent person would exercise under like circumstances.' See, also, 2 R. C. L., p. 474, Sec. 32; State v. Phillips, 119 Iowa, 652, 94 N. W. 229, 67 L. R. A. 292; Weissengoff v. Davis, 260 F. 16, 171 C. C. A.

52, 7 A. L. R. 307; Firestone v. Rice, et al., 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266."

See also:

Brown v. Wyman (1923), 224 Mich. 360.

United States ex rel. McSweeney v. Fullhart, Circuit Court W. D. Penn. (1891), 47 Fed. 802.

United States v. Kaplan (1923), 286 Fed. 963.

Castle v. Lewis, 254 Fed. 917.

In the case of *Scibor v. Oregon-Washington R. & N. Co.* (1914), 70 Ore. 116, 140 Pac. 629, the facts show that Mack, a watchman and deputy sheriff, saw Thomas Scibor stealing wheat from the company, followed him to his house where he found the plaintiff and arrested him as being implicated in the larceny. The plaintiff resisted the arrest and was wounded and injured by the deputy sheriff and brought an action to recover damages for the assault. At page 123, the court said:

> "The law makes reasonable allowances for the infirmities of human judgment under the influence of human passion, and it does not require him to measure with methodical precision the degree of force necessary to arrest a person or repel an apparent attack, or to compel submission to an officer; it simply requires all men, whether under the heat of sudden passion or extraordinary circumstances, to exercise such reasonable discretion in the use of force as under those peculiar circumstances may seem to be necessary."

In the case of *State v. Lane,* 158 Mo. 572, the defendant was a night marshal and was charged with the murder of one McGregor. The deceased was drunk and disorderly and was carrying a revolver. Officer Lane attempted to arrest the deceased and make him give up the revolver. Deceased refused to do so. The officer took hold of the deceased, threw him upon the floor and took the revolver away from him, and on the way to the city jail a scuffle followed. The deceased refused to go in the jail. The officer struck the deceased on the head, knocking him down.

The testimony showed that the officer was a much larger and stronger man than the deceased. At the time of the fatal blow the deceased had no weapon. At page 558, the court said:

> "The common law is thus stated by East: 'Where persons having authority to arrest or imprison or otherwise to advance or execute the public justice of the kingdom and using the proper means for that purpose are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable.' In State v. Fuller, 96 Mo. 165, this court said: 'An officer in making an arrest should use no unnecessary violence; * * * the defendant is guilty of no offense unless he resorted to extreme and unnecessary measures—unless he shot Horne when there was no reasonable necessity for so doing, * * *.
>
> "* * * Considering the inequality in the size of the officer and the prisoner, * * * we do not think we can, as a matter of law, say that he did not use excessive and unnecessary means to compel obedience to his authority."

In *Meldrum v. State* (1915), 23 Wyo. 12, 146 Pac. 596, Meldrum, a town marshal, attempted to arrest one Bowen for breach of the peace. Bowen resisted the arrest and the marshal used force to compel him to accompany him. On the way to the jail an altercation took place between them, during which several shots were fired by the marshal with his pistol. It was found that the misdemeanant had been mortally wounded. The officer Meldrum was 47 years old; Bowen, 30, and outweighed the officer about 50 pounds.

The statutes of Wyoming, Section 1355 and Section 1356, Compiled Statutes of 1910, require an officer to promptly arrest, without warrant, any person violating within his presence any law of the state. At page 40, the court said:

> "It is the general rule that a peace officer is not permitted to kill or maim one who is resisting or who does not peaceably submit to the arrest. The degree of force used by the officer is not permitted to go to that extent unless the culprit assaults the officer, when the right of self-defense accrues to the officer."

The general rule of law that an officer making an arrest should make known his authority where he has an opportunity to do so is set forth in 5 C. J., page 419, Sections 49 and 50:

> "Sec. 49. As a general rule one making an arrest on a criminal charge should inform the person arrested, if there is reasonable opportunity so to do, of his authority and intention, unless the facts are already known to such person."

> "Sec. 50. In making an arrest without a warrant it is usually held that a *known peace officer* is not bound to disclose his character or authority, or give notice of his intention, until the party has submitted, as his known official character is sufficient in the first instance to require submission until formal notice of authority and intention to make an arrest, and the cause for it, can be given. But when the officer has effectually consummated the arrest he should inform the prisoner of his authority, and the cause for which the former is arrested. The reasons for so doing are as great, if not greater, than where there is a warrant. Some decisions and statutes in terms require the officer in making an arrest to give notice of his authority, intention, and the cause of the arrest; but this probably means no more than that such notice must be given at the time or upon the occasion of the arrest, and not necessarily before taking the person into actual or potential custody. It is sufficient if such notice is given upon the occasion of the arrest, at the earliest reasonable opportunity. Where the arrest is made at the time of the commission of the offense, or upon quick pursuit of the offender, or where the officer is met with a demonstration of force at the outset, notice by the officer is unnecessary as the circumstances afford sufficient notice and the vain ceremony of telling one what he already knows is not required."

See also 2 R. C. L., page 464.

Chief Justice Fuller, in the case of *Starr v. United States, supra,* at pages 619-620, announced the rule of law that where an officer has the reasonable opportunity to disclose his identity he should do so. Wilson, the deceased, was

summoned as a posseman by a United States Marshal to serve a warrant upon the defendant. He discovered the defendant, Starr, and pursued him on horseback. Both dismounted and stood facing each other, apparently talking. Wilson mounted his horse again and rode closer, then suddenly sprang from his horse and fired at the defendant, Starr, who returned the fire. Defendant, Starr, also shot at the marshal. There was no satisfactory evidence that Wilson revealed his identity to Starr.

In *State of N. C. v. Gosnell* (Circuit Court W. D. N. C., 1896), 74 Fed. 734, the defendant was summoned to assist a regular officer of the United States to serve a legal process on the deceased. It appears that the deceased refused to submit to arrest and manifested a purpose to resist with a deadly weapon and with dangerous violence. The question involved was the degree of force that may be used by an officer of the law in making an arrest. The court, at page 738, said:

> "Where an officer has legal authority to arrest, and, while using proper means, is resisted, he may repel force with force, and need not give back an inch; but he must not use excessive violence, far beyond the emergencies of the occasion." (Citing *Starr v. U. S.*, 614, 14 Sup. Ct. 919; *Beard v. U. S.*, 158 U. S. 550, 15 Sup. Ct. 962.)
>
> "An officer, in attempting to arrest a person charged with a misdemeanor, is not justified in shooting him, when trying to avoid arrest by flight. The officer is in no personal danger, and the offender may be arrested at another time. But when such offender resists arrest the officer may use sufficient force to overcome resistance, and if the resistance is with a deadly or dangerous weapon the officer may resort to extreme measures to avoid serious injury and accomplish the arrest. He is never required, under such circumstances, to afford the resisting offender the opportunities of a fair and equal struggle, but may avail himself of any advantages that arise in the conflict. If he is a known officer, and has legal authority to arrest, and resist-

ance is made, he is not bound to show or read the warrant before arrest is secured."

Citing *State v. McMahan,* 103 N. C. 379, 9 S. E. 489; *State v. Garrett,* Winst. Eq. 144; *U. S. v. Rice,* 12 Myers Fed. Dec. Sec. 636; Fed. Cas. No. 16,153.

See also:

United States v. Clark, Circuit Court E. D. Mich. (1887), 31 Fed. 710.

In re Laing et al., Circuit Court S. D. W. Va. (1903), 127 Fed. 213.

In *Harding v. State* (1924), 26 Ariz. 334, Harding was a police officer in Phoenix and signalled the occupants of an automobile to stop, but the car went on, then turned around and came back by the officer, who attempted to stop the car again, but the car passed, whereupon the officer fired at the left hind casing of the car and one of the occupants was killed. The deceased was exceeding the speed limits and was also intoxicated. Both offenses were misdemeanors. The court, at page 338, said:

"Under section 854 of the Penal Code, a peace officer is authorized, either with or without a warrant, to make arrests of persons committing, or attempting to commit, a public offense in his presence. Since the deceased was, at the time appellant shot him, actually committing a misdemeanor, the appellant under the law had a right to arrest him, but the question is, did he, under the facts, have a right to shoot him? It must be admitted that there is a wide difference between the right to arrest a misdemeanant and to kill him. In Willie v. State, 19 Ariz. 346, L. R. A. 1918D, 373, 170 Pac. 869, we quoted with approval from Petrie v. Cartwright, 114 Ky. 103, 102 Am. St. Rep. 274, 59 L. R. A. 720, 70 S. W. 297, the following language:

" 'The notion that a peace officer may, in all cases, shoot one who flees from him when about to be arrested is unfounded. Officers have no such power, except in cases of felony, and there as a last resort, after all

other means have failed. It is never allowed where the offense is only a misdemeanor.'

"This is practically the universal rule. (Citing 5 C. J. 426, *supra.*)

"In State v. Sigman, 106 N. C. 728, 11 S. E. 520, it is said:

" 'An officer who kills a person charged with a misdemeanor, while fleeing from him, is guilty of manslaughter, at least.'

"The reason for limiting the powers of a peace officer in making an arrest of a person committing, or attempting to commit, a public offense of the grade of misdemeanor in his presence is that organized society will suffer less by the temporary escape of such person than it would if the officer should be permitted to take his life, or inflict upon him great bodily harm, to prevent his escape. Most of the acts graded as misdemeanors have no element of moral turpitude, and are offenses simply because the public policy, through the law-making body, has so decreed. But even when the act is *malum in se*, and is graded as a misdemeanor, it is not thought to deserve death at the hands of an arresting officer simply because the offender seeks to avoid arrest by running away. When the offense is bad simply because prohibited, much less should the officer assume to take the offender's life if he disregards orders, and fails to stop when commanded to do so, but keeps on going. Persons charged with petty offenses do not usually run very far nor hide out very long, and if they do not later seek the officer, and surrender to him, it is ordinarily easy enough for the officer to find them and arrest them without bloodshed. But, whether such offenders are ever arrested or not, no peace officer has any right to shoot them because they do not halt when told to do so—'the theory of the law being that it is better that a misdemeanant escape than that human life be taken.' United States v. Clark (C. C.), 31 Fed. 710. In Thomas v. Kinkead, 55 Ark. 502, 29 Am. St. Rep. 68, 15 L. R. A. 558, 18 S. W. 854, the court was considering the power of a peace officer to rearrest an escaped misdemeanant, and concluded that it was the same and no greater than in making an

original arrest. In arguing the question, the court used this very pertinent language:

"'And it would ill become the "majesty" of the law to sacrifice a human life to avoid a failure of justice, in the case of a petty offender who is often brought into court without arrest, and dismissed with a nominal fine. It is admitted that an officer cannot lawfully kill one who merely flees to avoid arrest for a misdemeanor, although it may appear that he can never be taken otherwise. If he runs, then, before the officer has laid his hands upon him with words of arrest, he may do so without danger to his life.'

"See also, 1 Michie on Homicide, page 257, section 72."

The judgment of the lower court was affirmed.

See also:

Note. L. R. A. (1918D).

Annotations and Notes: 3 A. L. R. 1170; 42 A. L. R. 1200.

84 Am. St. Rep. 679, 702.

State v. Phillips, 119 Iowa 652, 67 L. R. A. 292.

Robinson v. State, 93 Ga. 77, 18 S. E. 1018.

In *Lane v. Butler* (1922), 225 Ill. App. 382, Butler claimed to be a watchman and acting police officer of the City of Farmington. He assaulted Lane, plaintiff in this case, by striking him a violent blow on the head with a heavy club or cane and that by reason thereof Lane was permanently injured. Butler alleged self-defense. Officer Butler attempted to stop the plaintiff from entering a place where refreshments were being served by certain ladies, when a quarrel ensued and the injury complained of was inflicted. The court, at page 386, said:

"* * * Even if appellee had attempted to arrest appellant for a breach of the peace, which he did not do, he would not have been justified in using wanton violence or in resorting to dangerous weapons. Except in self-defense, an officer has no right to proceed to the

extremity of shedding blood in arresting, or in preventing the escape of one whom he has arrested, for an offense less than felony, even though the offender cannot be taken otherwise, a distinction being recognized in this respect between felonies and misdemeanors. 5 Cyc. 424; North v. People, 139 Ill. 81.

"In State v. Smith (Iowa), 101 N. W. 110, in laying down the reasons for this rule, the court says:

" 'It is a well-approved maxim that the law has a tender regard for human life, and, as a general rule, a person assaulted without provocation cannot carry his right of self-defense to the extent of using a deadly weapon upon his assailant, save where the circumstances are such that, to his apprehension as a reasonable man, such extreme measures are necessary to save himself from death or very great bodily harm. In our judgment, something of the same solicitous care for human life should be required of the officer making the arrest, and that it is better that a misdemeanant escape than that the power to arrest be asserted to the extent of killing one where the offense subjects him to only a trifling fine, or confinement for a few days in jail. This does not require the officer to retreat before a display of force, nor deprive him of the common right to self-defense, but simply denies him the right to use a deadly weapon or take human life in enforcing an arrest for a misdemeanor, even though without such force the wrongdoer may escape.' "

In *People v. Klein* (1922), 305 Ill. 141, Klein, a deputy sheriff, was convicted of murder. The question was whether the killing was accidental or murder. Klein, while walking along a roadway, attempted to stop an automobile. The officer shot and killed one Neumann. At page 146 the Court said:

"The offense, if one was being committed by the deceased and his companions, was but a misdemeanor. An officer, generally, may use a deadly weapon, even to the extent of taking life, if necessary to effect the arrest of a felon, for the reason that the safety of the public is endangered while such felon is at large; but the rule, by the great weight of authority both in this

country and in England, is, that except in self-defense an officer may not use a deadly weapon or take life to effect an arrest for a misdemeanor, whether his purpose is to kill or merely to stop the other's flight. This is true, even though the offender cannot be taken otherwise. State v. Smith, 127 Iowa 534; State v. Sigman, 106 N. C. 728; Conraddy v. People, 5 Park. Crim. (N. Y.) 234; Commonwealth v. Longhead, 218 Pa. 429; Forster's case, 1 Lew. C. C. (Eng.) 187; 5 Corpus Juris 426; Wharton on Homicide (3d ed.), sec. 500."

Edward Forster's Case—Lewin's Crown Cases, Vol. I., II., p. 187.

The prisoner was an excise officer and in the execution of his duty had seized two smugglers whom he detected in the act of landing whiskey from a Scottish shore. One of the smugglers struck the officer on the head with a stick. The officer shot at the smuggler's legs in the hope of stopping him from any further attack. But the smuggler prepared to make another assault and the officer informed him he would shoot him and did so when the smuggler made a fresh attack.

Per Holroyd, judge, had this to say to the jury:

"An officer must not kill for an *escape*, where the party is in custody for a misdemeanor; but, if the prisoner had *reasonable ground* for believing himself to be in peril of his own life or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of any such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received and weapons are used in heat, and death ensues, although the party may have been, at the commencement, in the prosecution of something unlawful, still it would be manslaughter in the killer, though manslaughter only. In the present case it is admitted that the custody was lawful. The jury are then to say, whether, under all circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself,

as any reasonable man might fairly and naturally be expected to resort to."

In *Presley v. State* (1918), 75 Fla. 434, 78 S. 532, L. R. A. 1918D, the defendant was convicted of a murder of Pickering, a deputy sheriff. The officer was searching with a warrant for a man along a public road at night. The officer came upon Pickering, who had a pistol in his hands, and ordered the defendant to stop. Upon two or three occasions the officer attempted to draw his gun. Pickering sought to draw his gun when Presley fired, each firing thereafter. The contention of the state was that the defendant was violating the law by carrying a pistol. This was a misdemeanor.

The court, at page 977, said:

"It has long been the settled law in this country that one may lawfully repel an attack upon him, although made by an officer who tries to arrest him, if he does not know that the person trying to make the arrest is an officer. This is true, regardless of whether or not the party attacked has committed some offense which subjects him to arrest. Starr v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919.

"The case of Miller v. State, ... Fla. ..., L. R. A. 9118C 562, 77 So. 669, decided at the present term of this court, is very much in point, and in that case the authorities are gathered and examined.

"It is very necessary that officers of the law be protected against violence at the hands of the lawless, both white and colored; but in order to come within the protection of the law they must make known their official capacity before exercising their prerogative of arrest with the attendant assault. Upon thus making themselves known, they come within the protection of the law, and the citizen is bound to submit, at least to the point of ascertaining the character of the charge and the extent of the officer's authority. But when an officer goes forth upon the public highway confronting travelers with commands to halt, hold up their hands, and so forth, without making known his official capacity, the person accosted has a right to defend him-

self as a reasonably prudent man would do under similar circumstances, unless it be shown that he otherwise had knowledge of the official capacity of his intercepter.

"Whatever there may be of racial or caste distinctions in other realms of society, all men are equal before the law in the matter of security for their persons and property, and this right to repel unexplained assaults is no less the right of the humblest citizen of the land than of the highest.

"*It is urged by the state that the question of whether or not the defendant knew his intercepter to be an officer of the law was a question of fact for the jury. This would be true if there were any conflict in the evidence at this point, or any testimony that he had such knowledge.* But, even admitting that his brother-in-law told him that deputy sheriffs were likely to arrest him, he would nevertheless have had a right to presume that they would approach him in a proper and legal manner, and *would have been warranted in repelling the assault, made in the manner it was, unless he had acquired actual knowledge in some other way that he was being halted by an officer.*" (Italics ours.)

Again, at page 978, the court said:

"But, even admitting that the defendant was committing a misdemeanor in carrying the pistol, this fact would not justify the manner in which the deceased accosted him. In the case of Starr v. United States, supra, Chief Justice Fuller crystallized the law of this subject by saying that the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, does not impose a limitation upon the right to repel such assault. In other words, the mere fact that a man may be subjected to arrest for violation of some penal statute does not put him to the necessity of submitting to unexplained interceptions and assaults by strangers whom he meets on the public highway."

See also:

Hurd v. State (1917), 119 Tenn. 583, 108 S. W. 1064.

Bray v. U. S. (C. C. A. S. C. 1923), 289 Fed. 331.

Brown v. United States, 47 Fed. (2d) 681.

In the case at bar, the official identity of the prohibition agent was unknown to the deceased, so there can be no conflict of fact, and is, therefore, purely a question of law.

VII.

A petition based upon mere recitals and conclusions does not fully advise the court conformably to the rules of good pleading, and is insufficient in law to warrant the removal, under Section 33 of the Judicial Code.

The State of Colorado contends that the facts surrounding the taking of human life by the petitioner were not fully set forth or disclosed and that only half the story has been told by the petitioner.

Every opportunity was afforded the petitioner and his eminent counsel to meet the objections of an insufficient petition based upon conclusions and recitals. The motion to quash the writ and remand the cause was filed upon the 20th day of November, A. D. 1931, by the District Attorney of Arapahoe County, Colorado, and oral argument upon the motion was heard before the Hon. J. Foster Symes, Judge of the United States District Court for the State of Colorado, upon the 4th day of December, A. D. 1931. A month and one-half intervened between the time of the filing of the motion to quash and the order of the court overruling the motion to quash and remand entered upon the 2nd day of January, A. D. 1932.

The seriousness of the charge against the petitioner, the nature of the offense alleged to have been committed by the deceased and all of the facts and circumstances out of which the transaction arose demanded a complete statement

in the petition without the necessity of a motion to remand, as law and good conscience required.

To grant a removal where the facts are concealed or based upon conclusions and recitals, is such a protection not warranted by Section 33 of the Judicial Code.

The inability of the State courts to function and punish one who has transgressed its laws, weakens the structure and destroys the confidence of the people in local self-government.

In the case of *Chesapeake & Ohio Railway Co. v. Cockrell, Administrator* (1913), 232 U. S. 146, (cited by Chief Justice Taft in *Maryland v. Soper, supra*), Mr. Justice Van Devanter, in delivering the opinion of the court, determined the law that the right of removal could not be rested upon mere legal conclusions set forth in the petition, and on page 151 had this to say:

> "The right of removal from a state to a Federal court, as is well understood, exists only in certain enumerated classes of cases. To the exercise of the right, therefore, it is essential that the case be shown to be within one of those classes, and this must be done by a verified petition setting forth, *agreeably to the ordinary rules of pleading*, the particular facts, not already appearing, out of which the right arises. It is not enough to allege in terms that the case is removable or belongs to one of the enumerated classes, or otherwise to rest the right upon mere legal conclusions. As in other pleadings, there must be a statement of the facts relied upon, and not otherwise appearing, in order that the court may draw the proper conclusion from all the facts and that, in the event of a removal, the opposing party may take issue, by a motion to remand, with what is alleged in the petition. Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 202; Carson v. Dunham, 121 U. S. 421, 426; Crehore v. Ohio & Mississippi Ry. Co., 131 U. S. 240, 244; Chesapeake & Ohio Railway Co. v. Powers, 169 U. S. 92, 101."

See also:

> 49 C. J., Sec. 88, page 90.

In *Pomeroy's Code Remedies,* Fifth Edition, Sec. 443, Footnote, p. 691, it is said:

> "*Pleading by Way of Recital.* It is a well-recognized general rule that material facts, essential to the cause of action, should be alleged directly and not by way of recital. In Berry v. Dole, 87 Minn. 471, 92 N. W. 334, it was held that a pleading which offended against this rule was bad on general demurrer. The same doctrine was announced by the Supreme Court of Indiana in Erwin v. Cent. Union Tel. Co., 148 Ind. 365, 46 N. E. 667. See also Indianapolis, etc., Rapid Transit Co. v. Foreman, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185. The rule was very instructively applied in McElwaine-Richards Co. v. Wall, 159 Ind. 557, 65 N. W. 752, to a complaint by a servant for an injury suffered from a fall consequent upon his being sent to work in an insecure and unsafe place. Also in Leadville Water Co. v. Leadville, 22 Colo. 297, 45 Pac. 362, it was held that allegations by way of recital are insufficient, and objection thereto may be taken by general demurrer, for the reason that an allegation by way of recital cannot be denied, and no issue concerning it can ever be raised. The court cites the text, secs. 443, 444.
>
> "See also Rocky Mountain Co. v. Kovaics et al., 26 Colo. App. 554, 144 Pac. 863; see also 21 R. C. L. 448."

In *Bliss on Code Pleading,* Third Edition, Ch. XV, p. 463, we find:

> "Sec. 318. *Recitals of Facts.* Facts should be stated, alleged, averred, and not given by way of recital. (144) * * * but is introductory to a statement, hence, in common-law pleadings, where it is allowed as to a class of allegations, it is not traversable. One cannot deny what is not asserted; the recital asserts nothing, and, hence cannot be met by a denial.
>
> "'* * * that a good pleading should contain but a single traversable allegation; that the other material averments should be grouped around it as it were, and come in by way of recital, not as containing matters directly averred or charged, but things which had occurred to sustain or give character to the charge.
>
> "But the Code ignores the idea of singleness of is-

sue; every material fact may be traversed, and to that end, should be directly averred. The pleading should contain 'a plain and concise statement of the facts constituting a cause of action,' * * *. These requirements negative the idea that any fact may be stated by way of recital; for that is neither the plain nor the ordinary way of stating facts.

"(144) (It was a rule at common law, and has been adopted under the Code, that matters cannot be pleaded by way of recital. Facts must be positively alleged. Shafer v. Bear River & A. W. & Min. Co., 4 Cal. 294; Hall v. Williams, 13 Minn. 260 (Gil. 242); Jackson School Tp. v. Farlow, 75 Ind. 118; Indiana, B. & W. Ry. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5.)"

See also:

5 C. J. 650.

In *Shapiro v. Michelson*, 19 Texas Civil Appeals Reports 615, at page 617, it is said:

"Now, independent of the allegations alleging the battery, there is no averment in the petition charging facts which constitute in law an assault upon the plaintiff. The use of the expression 'assaulted' is not the averment of a fact, but is simply a statement which expresses the conclusion of the pleader; and, * * *" Quoting Stivers v. Baker, infra.

In *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491, the question before the court was the sufficiency of the petition of an alleged unlawful assault. At page 508 the court said:

"The petition avers that the appellees did 'unlawfully, and without right or cause, with force and arms set upon and assault him (the appellant), while under arrest, and did thereby put him in great fear, and heap upon him great shame and indignity, and other injuries * * * whereby he was damaged * * *.' This amounts to nothing more than a statement that they unlawfully assaulted him.

"Is the petition sufficient?

"* * * The Code has swept away mere form, but the common law rules of legal procedure remain, and

every averment necessary to a good declaration at common law must be made in the petition. (Lou. & Port. Canal Co. v. Murphy, Administrator, etc., 9 Bush 522.)

"The pleader must state the facts constituting the cause of action. This is the common law rule, and it is not only necessary to enable the opposite party to form an issue and to inform him of what his adversary intends to prove, but to enable the court to declare the law upon the facts stated. It cannot do so if a mere legal conclusion is stated.

"The term 'assault' has a legal meaning, as much so as the word 'trespass.' It has been defined to be 'an inchoate violence to the person of another, with the present means of carrying the intent into effect;' * * * It may be committed in very many ways; as to present a gun or other weapon in a threatening manner within harming distance; * * *.

"The petition in this instance does not state what the party did upon which the appellant bases his charge of assault; he merely avers that he was unlawfully assaulted.

"The term as used in a pleading has its legal meaning; it is actionable in its legal sense only; and how is a court to determine upon a demurrer to the petition whether the complainant has been assaulted, unless he states the facts. The *ipse dixit* of the pleader to this effect will not answer, because this would make him the judge of the law instead of the court.

"Whether the acts of a party authorize the legal conclusion that he has committed an assault is to be determined by the court, and it cannot do so unless they are stated. As well might it be said that a petition for trespass is sufficient, although it merely avers that defendant *trespassed* upon the plaintiff's premises; or that an indictment is good if it merely charges A with *murdering* B.

"If it can be fairly claimed that the word 'assaulted,' when used in pleading, amounts to a statement of both a fact and a legal conclusion, yet it is not such a statement of facts as will enable the court to determine whether the party charged has, by his acts, committed what is in law an assault.

"In 1 Hilliard on Torts, page 179, it is said: 'The question, what constitutes an assault, is a question of law to be determined by the court.' This it cannot do upon a demurrer to the petition, unless the acts done are stated. If they are set forth, it is not indispensable that the pleader should use the legal term 'assault,' although it is usual to do so in this form of action.

"The judgment sustaining the demurrer to the petition, and dismissing the action upon failure to plead further, is affirmed."

The petition for removal is in the nature of a civil proceeding and is to be analyzed conformably to the rules of pleading (*Maryland v. Soper, supra*) and in no way affects the guilt or innocence of the defendant.

The same reasoning and law in the case of *Stivers v. Baker, supra,* apply to the conclusions and recitals contained in the Dierks case, to-wit, (Ex. "A," pp. 20, 21) "that Melford Smith did resist arrest, did attempt to destroy said bottle of wine, and did proceed to assault your petitioner and did attempt to escape; and that thereupon one Al Green did attempt to assist the said Melford Smith to assault your petitioner, and to help the said Melford Smith to escape, * * * and in protecting himself in the discharge of his duties * * * it became necessary in order to subdue the said Melford Smith for your petitioner to strike."

CONCLUSION.

We have attempted to analyze in this brief the petition of the defendant Dierks in the light of what we conceive to be the general rules of law applicable to the case at bar. In doing so, we have quoted and cited many decisions of the Federal and State courts in support of our position that the Hon. J. Foster Symes, Judge of the United States District Court for the District of Colorado, has placed an erroneous interpretation upon the petition, under Section 33 of the Judicial Code.

It will be remembered that the defendant Dierks was

acting upon suspicion and had no knowledge that the deceased was in possession of intoxicating wine at the time of the crime charged in the information. Further, it does not appear from the petition that the defendant Dierks at any time disclosed his identity, or that the deceased knew that the defendant was a prohibition agent. The officer, under the circumstances, became the aggressor.

What serious infraction of the law prevented him from disclosing his identity? Isn't it reasonable to suppose if he had made known his authority as a reasonable man and efficient officer would have done under like circumstances, the deceased would have respected a lawful request to deliver the wine and avoided the consequences of taking human life?

We are constrained to believe that the concealment of facts and circumstances behind a shield of conclusions and recitals has for its purpose a trial in the United States District Court, defense by an officer of the court and the expectation or imagination "of the accused that he will gain by the removal." (*Virginia v. Rives, supra,* page 12 of this brief.)

The first part of the petition contains a full statement of the facts and circumstances to the point where it alleges the petitioner attempted to take possession of the wine (page 3). But from there the petition is one of concealment and evasion. There is not a statement or fact or circumstance pointing out in what manner the deceased Melford Smith resisted the alleged arrest, with force or otherwise, or what he did, if anything, in attempting to destroy the bottle of wine or in the alleged scuffle or in the attempt to escape except by way of recitals. The statement "did proceed to assault" is not an allegation in law or in fact, or otherwise, of an attempt to assault. The allegation that it "became necessary in order to subdue said Smith for

your petitioner to strike'' the deceased on the head with a gun is a bare recital and conclusion.

The petition is silent as to what made it necessary for the defendant to protect himself in the discharge of his duties as alleged, and does not constitute self-defense, nor is there an allegation that he was acting in self-defense. What did Al Green do, if anything, to aggravate and cause the petitioner to strike the deceased upon the head? What aid and assistance did he give to the deceased in the alleged attempt to escape or to assault the petitioner? Did Al Green threaten or intimidate the petitioner or protest? Did the petitioner strike the deceased before or after the alleged intervention of Al Green? All of the conclusions and recitals, if true, should be amplified by the facts and circumstances.

The allegation that the deceased was placed in jail and did not appear to have received any serious or other injury is somewhat contradictory and cannot be determined as to whether or not the petitioner meant that the injury was not serious or that the deceased received no injury. The allegation that the deceased became sick and died is evasive and vague, and carries with it an intimation that Melford Smith died from other causes.

Does the petitioner rely upon self-defense as a justification of his act, because he alleges he was protecting himself in the discharge of his duties? Has a prohibition agent a right and is he justified by his federal duty to use violence or kill a person who resists an attempted seizure of intoxicating liquor in the physical or constructive possession of the person assaulted or killed? Likewise, has a prohibition agent a right and is he justified by his federal duty in subduing a prisoner whom he has arrested for a misdemeanor committed in his presence to take the life of the accused and what force may he use in so doing? It all depends upon the facts and circumstances.

The intent of Congress in adopting Section 33 of the Judicial Code, requiring that all facts be set forth in a petition for removal, is manifested by the language employed. The law requires that a certificate of an attorney of record of the State or of the United States must accompany the petition setting forth that such an attorney has examined the proceedings mentioned in the petition and that he has carefully inquired into all the matters set forth in the petition and that he believes them to be true. It is self-evident that Congress contemplated that situations might arise upon attempted removals where the petitions are insufficient in law and further to prevent a removal where the officer was acting beyond the scope of his authority or color of his office, and not justified by his duty in committing the act upon which the State has based its criminal prosecution. (Appendix, pages 49-50 of this brief.)

To illustrate the incongruity of a removal granted upon recitals and conclusions in a petition, substitute for the defendant Dierks, in the instant case, a prohibition agent, "A," of large stature and powerful physique. Let the deceased be represented as "B," a boy of 17 years, with a desire to live and on the threshold of manhood, of slight stature and frail constitution, incapable of offering serious resistance to one of his own age, let alone a man of "A's" type. Let Al Green be represented as "C," an elderly man of good repute in the community. Need we comment upon the illustration?

"A" attempts to seize the pint bottle of wine. "B" is startled and offers that natural and instinctive resistance when accosted by a stranger—a scuffle ensues. "C" enters the hamburger stand and noticing the officer's attack, remonstrates with "A" and protests the treatment of "B." In order to subdue "B," "A" violently strikes "B" upon the head with a deadly weapon, causing a complete fracture of "B's" skull—a mortal wound. "B" is thrown into prison and abandoned without medical attention or human compassion—death in jail!

It cannot be seriously denied or controverted but what the incidents set forth in the illustration above might happen under the allegations of the petition in the case at bar, or even an offense of a more atrocious nature, if possible, and a removal under such circumstances is unconscionable.

The State of Colorado is vitally interested in the enforcement of law and ample protection of all officers and should surround the officer charged to enforce the law with the proper protection and authority to arrest, with or without warrant, for misdemeanors committed in the presence of the officers. Society demands an orderly administration and enforcement of its law.

In making such an arrest an officer should have the right to use such force as is reasonably necessary. Arbitrary violence and brutality committed in the exercise of supposed authority is a menace to the peace and dignity of the United States and of the States of the Union. The unjustifiable taking of human life by an officer will do more to destroy the effective operation of the prohibition laws than any prejudice against the law itself.

"Law is a rule of human conduct" and it applies to officers as well as to private citizens.

The delicate relations that exist between the United States courts and those of the State should not be easily disturbed, unless it is very apparent that the operation of the federal laws will be seriously affected.

We, therefore, contend that the petition of Henry Dierks is insufficient in law or otherwise to constitute a defense of immunity from punishment by the laws of the State of Colorado, and that the Hon. J. Foster Symes, Judge of the United States District Court for the District of Colorado, erroneously interpreted the petition in removing the prosecution from the District Court of Arapahoe County, Colorado, to the United States District Court, without warrant

in law, and that the writ of mandamus should issue as prayed for in our petition.

Respectfully submitted,

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APPENDIX.

SECTION 33, JUDICIAL CODE, R. S. SEC. 643; ACT, MARCH 3, 1875, C. 130, SEC. 8, 18 STAT. 401; ACT, FEBRUARY 8, 1894, C. 25, SEC. 1, 28 STAT. 36; ACT, MARCH 3, 1911, C. 231, SEC. 33, 36 STAT. 1097; ACT, AUGUST 23, 1916, C. 399, 39 STAT.:

"When any civil suit or *criminal prosecution* is commenced in any court of a State *against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of such law, or on account of any right, title, or authority claimed by such officer or other person under any such law* or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: *Said petition shall set forth the nature of the suit or prosecution* and be *verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true,* shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of

the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or any other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. * * *." (Italics ours.)